EXHIBIT P

STATE OF MICHIGAN

IN THE 36TH JUDICIAL DISTRICT COURT FOR THE COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v.

Hon. Ronald Giles
Case No. 08-58169

KWAME KILPATRICK 82-08707051-01
CHRISTINE BEATTY 82-08707051-02,

Defendants.

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DEFENDANT KWAME KILPATRICK'S MOTION TO SUPPRESS CERTAIN EVIDENCE

Defendant Mayor Kwame Kilpatrick ("Kilpatrick"), by and through his attorneys, moves to suppress any and all evidence of text message communications obtained from SkyTel Communications, Inc. ("SkyTel") that were allegedly sent or received by Kilpatrick, and any and all evidence of text message communications obtained from Arch Wireless, as well as any testimony related to that evidence or knowledge acquired during a search of that evidence. Kilpatrick files this Motion on the grounds that the text messages were obtained in violation Kilpatrick's Fourth Amendment rights, in violation of the Stored Communications Act, and in violation of the Wiretap Act.

BACKGROUND

Kilpatrick does not know all the facts surrounding all of the events that have occurred, but believes that an evidentiary hearing would show that the following is true. Based on available information, Kilpatrick expects that the State will seek to introduce at the preliminary hearing, and elicit testimony concerning, various purported text message communications obtained from SkyTel that the State alleges were either sent or received by Kilpatrick. During a "whistleblower" lawsuit brought by two former police officers against the City of Detroit and Kilpatrick, the officers' attorney, Michael Stefani ("Stefani"), issued two pre-trial subpoenas to SkyTel to produce text messages sent by Kilpatrick to Defendant Christine Beatty ("Beatty") and text messages received by Kilpatrick from Beatty for the period of September 1, 2002 through October 31, 2002 and for the period of April 1, 2003 through May 31, 2003. (1/30/08 Stefani Dep. Tr. 106:2-9, attached as Ex. 1.) Kilpatrick objected to both subpoenas. (Id. at 111:1-19.) After a hearing on Kilpatrick's motion to quash, Judge Michael Callahan granted Kilpatrick's motion in part, and required that the requested text messages be delivered directly to the court for an in-camera inspection. (See Judge Callahan's Order, attached as Ex. 2.)

Stefani has testified that during the trial, when Stefani asked the court about the text messages, Judge Callahan informed Stefani that either the communications were never provided by SkyTel or the court misplaced the communications because Judge Callahan could not locate the subpoenaed text messages. (Id. at 166:1-2.) Stefani also states that, during the trial, Judge Callahan told him in open court to re-subpoena the records. (Id. at 112:24 – 113:3.) According to Stefani, he then issued another subpoena to SkyTel, without providing notice to the City of Detroit or Kilpatrick, and was told that the requested records were no longer available due to a corporate reorganization at SkyTel. (Id. at 113:3-7.) Stefani states that he followed Judge Callahan's orders and proceeded to contact a former SkyTel employee who was working at the State Department, who advised Stefani that the records were obtainable and provided Stefani with instructions on what to say in the subpoena in order to get the text messages. (Id. at 113:8-12, 17-19; 116:17-19.)

On September 11, 2007, the jury returned a verdict in favor of the plaintiffs and Kilpatrick stated his intention to appeal. Nearly three weeks after the trial ended – and unknown to the other parties to the litigation – on September 28, 2007, Stefani issued his fourth subpoena to SkyTel requesting SkyTel to "identify the work pager number(s) of pager(s) belonging to the City of Detroit for the use of Christine Beatty and produce text pager messages received by and sent from that pager number(s) for the period of September 1, 2002 through October 31, 2002 and for the period of April 1, 2003 through May 31, 2003." (Id. at 106:2-9.) Stefani has testified that he issued this subpoena for the purposes of post-trial motions. (Id. at 158:12-14.) Stefani did not serve the City of Detroit with a copy of the subpoena until October 17, 2007, during the facilitation of the settlement agreement. (Id. at 162:13-16.)

Any objection by Kilpatrick at that time would have been futile, because on our about October 5, 2007, SkyTel produced the requested text messages to Stefani pursuant to the September 28 subpoena. (Id. at 117:19-21.) During the negotiations on October 17, 2007, Stefani says that he presented to the facilitator an envelope containing a motion and brief in which Stefani argued that he was entitled to enhanced attorney's fees, in the amount of one million dollars, based on the content of excerpted purported text messages that Stefani received from SkyTel. (Id. at 122:4-123:23.)

Stefani testified that in keeping with the terms of the settlement agreement, he agreed to turn all originals and copies of the text message documents from SkyTel over to Kilpatrick's attorney. (Id. at 61:4-15.) On October 19, 2007, the Detroit Free Press filed a request under the Michigan Freedom of Information Act ("FOIA"), seeking the release of settlement-related documents. The City of Detroit objected to the request and no documents were released to the Detroit Free Press.

Nonetheless, on January 23, 2008, the Detroit Free Press published purported excerpts of texts messages allegedly sent and received by Kilpatrick. The Detroit Free Press refuses to reveal how it obtained the published information. However, the source of the text messages was presumably independent of any request made by the Detroit Free Press to SkyTel because Kilpatrick believes that SkyTel did not produce any purported text messages to the Detroit Free Press prior to January 23, 2008.[1]

Wayne County Prosecuting Attorney Kym Worthy ("Worthy") has repeatedly stated that she began her investigation into Kilpatrick's testimony related to the trial after reading about the purported text messages in the newspaper. (See 3/25/08 Worthy Press Conference Tr., attached

[1] Kilpatrick is seeking discovery and depositions in ongoing civil litigation with the goal of identifying the person or persons who provided these confidential, unlawfully obtained communications to the Detroit Free Press.

as Ex. 3.) Worthy issued an investigative subpoena,[2] and later several search warrants to Skytel and Arch Wireless to obtain the contents of Beatty's text messages that were sent or received between 2002 and 2003. (See 5/1/08 Letter to J. Johnson, attached as Ex. 4; 4/2/08 search warrant, attached as Ex. 5; 5/1/08 search warrant, attached as Ex. 6; 5/8/08 search warrant, attached as Ex. 7.) Kilpatrick was never given notice of either the subpoena or the search warrants. SkyTel produced to Worthy CDs containing text messages in response to the investigative subpoena, and presumably in response to the two issued search warrants. (See 5/1/08 Letter to J. Johnson, Ex. 4.)

The purported text message communications were obtained unlawfully by Worthy and Stefani. First, Worthy violated Kilpatrick's Fourth Amendment rights by obtaining the purported text messages pursuant to an investigative subpoena to SkyTel, without a valid search warrant, and without giving prior notice to Kilpatrick. Worthy's later search warrants resulted in evidence obtained in violation of Kilpatrick's Fourth Amendment rights, and tainted by the illegality of the warrantless search. Accordingly, the purported text messages obtained by Worthy must be suppressed. Second, Stefani obtained the purported text messages allegedly sent and received by Kilpatrick pursuant to a court order, in violation of Kilpatrick's Fourth Amendment rights and in violation of 18 U.S.C. §§ 2701–2712 (2006) ("The Stored Communications Act" or "the Act"), which does not allow for the production of text messages in the course of civil discovery. Even if the Court holds that Worthy's search warrants are not facially invalid, the fruits of Worthy's later searches must be suppressed as they are tainted by

[2] The State has never produced to Kilpatrick a copy of this or any other subpoena served on SkyTel. Kilpatrick bases this assertion on a letter sent by her officer to John Johnson, Corporation Counsel for the City of Detroit, which purports to provide "notice pursuant to 18 U.S.C.A. 2705," which is applicable to a governmental entity acting pursuant to court order or administrative subpoena. Worthy, however, does not have the authority to issue an administrative subpoena as it is understood in 18 U.S.C. § 2703(b), but only an investigative subpoena. As discussed in Section III infra, 18 U.S.C. §§ 2701-2712 does not provide for disclosure of electronic stored communications pursuant to an investigative subpoena.

this illegality. Moreover, because Worthy obtained the purported text messages in violation of the Stored Communications Act, the appropriate remedy is suppression of this evidence. Finally, the unlawful interception of these communications without probable cause is a violation of the Wiretap Act, and as a result, the evidence must be suppressed.

ARGUMENT

I. The Text Messages Were Obtained By The State In Violation Of Kilpatrick's Fourth Amendment Rights

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. The Fourth Amendment is made applicable to the states by the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 643 (1961). By obtaining the purported text messages without a valid search warrant based on probable cause, Worthy violated Kilpatrick's Fourth Amendment rights. Furthermore, even the after-the-fact search warrants issued by the prosecutor do not meet the stringent requirements of the Fourth Amendment. In fact, they are exactly the kinds of broad and general searches that courts routinely disallow as a violation of the Fourth Amendment.

A. Kilpatrick Has A Reasonable Expectation Of Privacy In His Text Message Communications

The records obtained by the State are not merely SkyTel's records, but rather are private correspondence, which is entitled to the utmost protection against intrusion by the government. To hold that the State is entitled to obtain these documents by mere issuance of a subpoena would deal a shocking blow to the Fourth Amendment rights of cell phone and pager users everywhere. The fact that this data is stored by a service provider rather than in the system owner's own home or files should be of no moment. An appropriate analogy is to a rental residence – courts routinely hold that a tenant has a privacy interest in the items in his residence,

even if he is not the owner of that home. Chapman v. U.S., 365 U.S. 610, 616-18 (1961) (search of a house occupied by a tenant violated the Fourth Amendment, even though landlord had authority to enter house for some purposes). Similarly, users of electronic communication systems are merely renting storage space from providers in order for their data to be held. It does not follow that a user relinquishes all expectation of privacy over that data simply because it is stored elsewhere.

In fact, the court's decision in Quon v. Arch Wireless Operating Co., Inc., (No. 07-55282, 2008 U.S. App. LEXIS 12766 (9th Cir. June 18, 2008) (attached as Ex. 8)) makes it clear that Kilpatrick has a reasonable expectation of privacy in the text messages stored on SkyTel's network. In Quon, the City of Ontario contracted with Arch Wireless to provide text-messaging pagers to its employees, including the members of the police department. Id. at *2. The City of Ontario had no official policy regarding the text-messaging pagers, though it did have a general "Computer Usage, Internet and E-mail Policy" which provided that city-owned computers were not for personal use, network activity could be monitored, and access to the Internet and e-mail system was not confidential. Id. at **4-5. When two police officers exceeded their monthly usage text-messaging allotment, the police chief ordered a lieutenant to request transcripts of those pagers from the wireless provider for auditing purposes. Id. at **8-9. As SkyTel did in the present case, Arch Wireless apparently provided the requested information without regard to the requirements of the Stored Communications Act. Id. at *10. Upon reviewing the transcripts, the police department determined that the officers were sending personal, often sexually explicit, text messages. Id. at *10.

The police officers subsequently brought claims against Arch Wireless, the City of Ontario, the police department and individuals. The Ninth Circuit held that the police officers

had a reasonable expectation of privacy in the content of their text messages vis-à-vis the service provider, Arch Wireless, and as a matter of law, the police officers had a reasonable expectation that the police department would not review their text messages without the consent of either a sender or recipient of such messages. Id. at **31-34. Moreover, the court found that because the "operational reality" at the police department was not to audit pagers, the plaintiff had a reasonable expectation of privacy in the text messages stored with Arch Wireless. Id. at *36.

Under the reasoning of Quon, Kilpatrick has a reasonable expectation of privacy in the text messages stored with SkyTel. Kilpatrick was provided with a pager by the City of Detroit and reasonably relied on his right to privacy as to any text message communications. The City of Detroit did not have any text message policy which might undermine this reasonable expectation. Accordingly, Kilpatrick has a constitutionally protected right to object to the unreasonableness of Worthy's searches and seizures of his purported text message communications.

Moreover, Kilpatrick's reasonable expectation of privacy is not diminished by his role as a public servant. As the Ninth Circuit noted in Quon, "the fact that a hypothetical member of the public may request Quon's text messages might slightly diminish his expectation of privacy in the messages, but it does not make his belief in the privacy of the text messages objectively unreasonable." Id. at *38. This principle is well-established and has been discussed by the Supreme Court: "Searches and seizures by government employers or supervisors of the private property of their employees . . . are subject to the restraints of the Fourth Amendment." O'Connor v. Ortega, 480 U.S. 709, 715 (1987). Likewise, the fact that the Mayor's Office provided the paging devices used by Kilpatrick and Beatty does not diminish Kilpatrick's privacy right. See United States v. Finley, 477 F.3d 250, 259 (5th Cir. 2007) (holding that an

employee had a reasonable expectation of privacy in the text messages on his cell phone even though it was owned by his employer because he was permitted to use the phone for his own personal purposes, and he had a right to exclude others from using it).

Finally, Kilpatrick has a privacy interest in the purported text messages to which he was a party, regardless of whether they were allegedly retrieved from his pager or Beatty's pager. Courts have expressed a willingness to find individuals have a legitimate expectation of privacy in shared electronic communications. Finley, 477 F.3d at 259 (holding that an employee had a reasonable expectation of privacy in the text messages he sent and received on his cell phone). In Warshak v. United States, the court recognized that protecting e-mail communications is important to Fourth Amendment principles and noted that "the mere fact that a communication is shared with another person does not entirely erode expectations of privacy." 490 F.3d 455, 470 (6th Cir. 2007) (reh'g en banc granted, op. vacated) (holding that a person has a reasonable expectation of privacy in email content that is stored with, or sent or received through, a commercial ISP). Any text message communications sent between Kilpatrick and Beatty are entitled to the same protections offered to private e-mail and telephone conversations. Id. at 473 ("To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication") (citing Katz v. United States, 389 U.S. 347, 352). Accordingly, Kilpatrick has standing to challenge the search of any purported text message communications.

B. Worthy Violated Kilpatrick's Fourth Amendment Rights By Obtaining Purported Text Message Communications From SkyTel Without A Valid Search Warrant

Warrantless searches are presumptively unreasonable under the Fourth Amendment. United States v. Ukomadu, 236 F.3d 333, 337 (6th Cir. 2001). A warrantless search by a

prosecutor is invalid unless it falls within one of the narrowly-delineated exceptions to the warrant requirement. Katz, 389 U.S. at 357. Worthy obtained the purported text messages without a valid search warrant and in violation of Kilpatrick's Fourth Amendment rights. There are no recognized exceptions which would save the warrantless search that resulted in such a profound invasion of privacy.

Instead of using a search warrant based upon probable cause, Worthy appears to have obtained Kilpatrick's purported text messages by issuing an investigative subpoena to SkyTel under a provision of the Stored Communications Act which allows for disclosure to the government without a valid search warrant when certain notice requirements are met.[3] 18 U.S.C. § 2703. The constitutionality of Section 2703(b) of the Act is in serious question. The Sixth Circuit Court of Appeals has held that the Act is unconstitutional on its face, to the extent that it allows a government actor, without a valid search warrant, to seize electronic files without giving the account holder notice and an opportunity to object. See Warshak, 490 F.3d 455. This raises serious doubt that any of the documents received by Worthy before notice was given were obtained in a manner consistent with the Constitution. As discussed in Section I, C, infra, evidence obtained in violation of the Constitution must be excluded.

C. The Evidence Must Be Excluded Because The Searches Of Kilpatrick's Purported Text Messages Pursuant To The Search Warrants Were Unreasonable

To the extent that Worthy attempted to cure her warrantless search with later search warrants, those searches were unreasonable. The Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend.

[3] As discussed more fully below, the Act refers only to administrative, not investigative, subpoenas. Therefore, it is doubtful that production in response to an investigative subpoena, even with notice, would be proper.

IV. "The touchstone of the Fourth Amendment is reasonableness." Quon, 2008 U.S. App. Lexis 12766, at *25. The totality of the circumstances determine whether a search is reasonable. Id. A search is reasonable in scope when it is reasonably related to the objectives of the search and not excessively invasive in light of the nature of the suspected misconduct. Ortega, 480 U.S. at 726.

Records show that during her investigation, Worthy issued two search warrants to SkyTel: the first on or about April 2, 2008; the second on or about May 1, 2008; and Worthy issued a third search warrant to Arch Wireless on or about May 8, 2008. (See Exs. 5-7.) The only apparent difference in these three warrants is that they request text messages from different pager numbers. Based on the totality of the circumstances, each of the search warrants were invalid and unreasonable because they were unspecific, overly broad, and failed to demonstrate probable cause.

1. The search warrants lacked the requisite specificity and were unreasonably broad

It has been clearly held that a valid search warrant must be "confined in scope to particularly described evidence relating to a specific crime for which there is demonstrated probable cause." United States v. Simpson, 152 F.3d 1241, 1248 (10th Cir. 1998) (quoting United States v. Robertson, 21 F.3d 1030, 1033 (10th Cir. 1994)); United States v. Algie, 721 F.2d 1039, 1041 (6th Cir. 1983). Generally, a search warrant is "sufficiently specific" in nature if it "enables the searcher to reasonably ascertain and identify the things authorized to be seized." Simpson, 152 F.3d at 1248; People v. Glenn, No. 237515, 2004 WL 691689, at *2 (Mich. App. 2004) ("A search warrant must describe with particularity the items to be seized") (attached as Ex. 9). Thus, general search warrants are invalid. People v. Hellstrom, 264 Mich. App. 187, 192 (2004) (citing People v. Toodle, 155 Mich. App. 539, 547 (1987)).

Each of the search warrants were invalid because they lacked the required specificity. First, the search warrants in question requested seizure of all text messages for a period of five-and-a-half years. (See Exs. 5-7.) Second, the search warrants requested seizure of all text messages for some fifteen different pager numbers over that time period. (Id.) Third, each of these search warrants failed, in any form or fashion, to limit the seizure to a particular individual or alleged time periods that were the bases of Kilpatrick's arrest warrant and formal criminal charges.[4] (Id.) Fourth, the search warrants did not request specific messages and the specific information to be obtained from the seizures of those messages. (Id.) Finally, the search warrants did not limit the text messages sought from specific individuals. (Id.)

Furthermore, the searches requested by the three warrants were not reasonable in scope. See Quon, 2008 U.S. App. LEXIS 12766 at **41-43; Ortega, 480 U.S. at 726. Courts have held that a search violates the Fourth Amendment when one "opted to review the contents of all the messages, work-related and personal, from numerous individuals and without the consent of the defendant." Quon, 2008 U.S. App. LEXIS at *43 (emphasis added). Worthy's search warrants sought the content of all messages sent to or from certain pagers over several years, and the majority of these pagers were used by persons other than Kilpatrick and Beatty. Undoubtedly, these included messages of a highly personal nature, including potentially discussions with physicians, spouses, or clergy. Moreover, the access granted to the State here is at least as invasive as wiretapping of telephone calls, which is usually only for a short period of time of no more than thirty days. See 18 U.S.C. § 2518(5). The content of stored text message communications, like telephone communications, must be protected by the Fourth Amendment. Therefore, the sweeping scope of the three search warrants renders them impermissibly broad.

[4] The amended felony complaint was issued on March 24, 2008.

The search warrant issued to Arch Wireless is particularly outrageous. (See Ex. 7.) The notion that the State can lawfully review the content of all text messages, sent and received over the course of five-and-a-half years, by eleven non-parties, for the sole purpose of bolstering the State's argument that text messages purportedly sent by Kilpatrick and Beatty are authentic, shocks the conscience. Worthy's search of these private discussions is well beyond the bounds of what is permitted by the Fourth Amendment, and such abuse of her prosecutorial authority should not be permitted.

2. The search warrants were not based on probable cause

The reasonableness standard requires that a search executed pursuant to a warrant be based on probable cause. Hellstrom, 264 Mich App. at 192. Probable cause exists when there is a '"substantial basis' for inferring a 'fair probability' that contraband or evidence of a crime will be found in a particular place." Id. (quoting People v. Kazmierczak, 461 Mich. 411, 417 (2000)). Worthy requested three search warrants with affidavits attached. In issuing a search warrant, the magistrate must evaluate the affidavit for the existence of probable cause and determine "whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238 (1983). Moreover, mere suspicion or mere speculation that the evidence sought exists does not rise to the level of probable cause. McCurdy v. Montgomery Co., Ohio, 240 F.3d 512, 519 (6th Cir. 2001) (noting that "government may deprive its citizens of liberty when, and only when, it has a viable claim that an individual has committed a crime, and that claim is supported empirically by concrete and identifiable facts").

A court's review of a finding of probable cause is limited to the four corners of the affidavit. United States v. Frazier, 423 F.2d 526, 531 (6th Cir. 2005). Thus, if the "information contained in the affidavit simply does not add up to probable cause, the warrant will be held invalid." United States v. Lambert, 771 F.2d 83, 93 (6th Cir. 1985) (citing United States v. Savoca, 761 F.2d 292, 296 (6th Cir. 1985)). The affidavits for the two search warrants issued to SkyTel and the search warrant issued to Arch Wireless generally state that: 1) the Detroit Free Press, at some time, published text messages that relate to criminal charges; 2) that the affiant is conducting an investigation; and 3) the affiant has probable cause for the issuance of the warrant.

First, to the extent that the affidavits appear to rely on information published by the Detroit Free Press, such information was insufficient to support a probable cause finding. See Messer v. Rohrer, No. C-3-95-270, 1997 WL 1764771, at *2 (S.D. Ohio, Mar. 31, 1997) (holding that a newspaper article cited in, and attached to, an affidavit supporting a search warrant is unsworn hearsay and must be disregarded as improper evidence) (attached as Ex. 10). In this instance, the role of the Detroit Free Press in the affidavits can be likened to that of an informant. However, the affidavits completely fail to establish that the Detroit Free Press, as an informant, was reliable, or that the information published by the Detroit Free Press had veracity or any basis of knowledge. Gates, 462 U.S. at 238 (establishing the "totality of the circumstances" test for determining whether an anonymous tip established probable cause); Spinelli v. United States, 393 U.S. 410, 418 (1969) (holding that an informant's tip was not sufficient to provide a basis for a probable cause finding); Aguilar v. Texas, 378 U.S. 108, 114 (1964) (issuing officer must conclude that the informant was credible or the informant's information was reliable); United States v. Smith, 182 F.3d 473, 477-78 (6th Cir. 1999). Moreover, where "the warrant affidavit is based almost exclusively on the uncorroborated

[hearsay] of an unproven confidential [source], without more" it is insufficient to establish probable cause. Frazier, 423 F.3d at 533 (citing Savoca, 761 F.2d at 295). Because the Detroit Free Press refuses to reveal the source of the purported text messages it published, any information obtained from the Detroit Free Press publications was insufficient to support a probable cause finding in the affidavits.

Second, there is no particularized basis or relevant information provided by affiant regarding the "investigation" referred to in the affidavits, including any basis for the belief that the particularized evidence concerning any text messages actually existed. See Smith, 182 F.3d at 477 (noting that a warrant will be upheld if the magistrate had a substantial for concluding that a search would uncover evidence of wrongdoing (citing Gates, 462 U.S. at 236)). The affidavits fail to provide any specific information about the referenced investigation.

Third, in each of the affidavits, the affiant states, without support, that he believes that probable cause exists. This is simply an opinion without factual bases, which is insufficient to allow an official to determine probable cause. Gates, 462 U.S. at 239 ("[the magistrate's] action cannot be a mere ratification of the bare conclusions of others").

The only information offered to support the issuance of the search warrants was obtained from an unknown source cited in a newspaper article, pursuant to an unspecific investigation, and based upon a bare assertion that probable cause existed. Accordingly, the affidavits were insufficient to establish the needed probable cause, rendering the search warrants invalid.

3. All evidence derived from the invalid search warrants must be excluded

In the context of a motion to suppress, Michigan follows the exclusionary rule. People v. Frazier, 478 Mich. 231, 247-48 (2007). The exclusionary rule bars the admissibility at trial of physical evidence and testimony acquired by law enforcement officers through unconstitutional

means. Id. at 247 ("The exclusionary rule is 'a harsh remedy designed to sanction and deter police misconduct where it has resulted in a violation of constitutional rights'" (quoting People v. Anstey, 476 Mich. 447-48 (2006))). Each of the search warrants were unconstitutionally invalid. Therefore, all evidence seized with the three search warrants must be excluded as "inadmissible as substantive evidence in . . . this criminal proceeding." Kazmierczak, 461 Mich. at 418 (citing In re Forfeiture of $176,598, 443 Mich. 261, 265 (1993)).

D. Evidence Obtained With The Search Warrants is Fruit of the Poisonous Tree

To the extent that the Court finds that Worthy's search warrants were valid, any evidence she obtained with them is tainted by her earlier warrantless search and should be excluded as fruit of the poisonous tree. The fruit of the poisonous tree doctrine provides that evidence that is unlawfully obtained, and all evidence derived from it, should be suppressed. Wong Sun v. United States, 371 U.S. 471, 485 (1963). Because Worthy issued her search warrants after obtaining evidence from SkyTel without a valid search warrant, her later searches pursuant to warrants stem from that same illegality. Accordingly, all evidence Worthy derived from the search warrants must be suppressed.

II. Civil Discovery Of The Purported Text Messages Violated The Stored Communications Act And Kilpatrick's Fourth Amendment Rights

Even if the Court were to determine that the search warrants issued by Worthy are valid and do not constitute unreasonable searches, the information received in response to the warrants is fruit of the poisonous tree. The search warrants were issued only after Worthy herself violated the Constitution, as discussed above in Sections I, B and C. Even if the State were to argue that Worthy's search warrant was the fruit of information first learned by Stefani in the civil suit, as opposed to her own unlawful search, that still amounts to fruit of the poisonous tree.

A. Stefani's Subpoenas Were Issued at the Court's Direction

Stefani himself testified that when he issued the subpoena to SkyTel, he was acting at the court's direction. (1/30/08 Stefani Dep. Tr. 112:24 – 113:3, Ex. 1.) Stefani testified that he was told in open court to reissue the subpoena when the documents were apparently not returned in response to his earlier court-ordered subpoena. (Id. at 166:1-2; 112:24-113:3.) He was merely carrying out the court's directive when he continued to seek the documents from SkyTel.

B. The Stored Communications Act Does Not Allow Disclosure For Civil Discovery

The court-sanctioned request for documents and subsequent production in the course of civil litigation was in contravention of federal law. Section 2702 of the Stored Communications Act details a service provider's obligation to maintain the confidentiality of the content of communications that it transmits and stores. Subsection (a)(1) states that "a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service." Section 2702(a)(2) similarly prohibits the disclosure of electronic communications held in "remote computing service." The language of the Act plainly expresses the Congressional intent to protect the privacy of electronic communications, except in limited circumstances which do not exist in the present matter. Disclosure of the contents of the requested communications to Stefani, even in response to the subpoena violates the Act.

Although there are exceptions to the Act's prohibition against disclosure, there is no exception for disclosure of the contents in civil discovery. Courts that have considered the question of whether civil discovery of stored electronic communications is appropriate have ruled that the plain language of the statute makes clear that it is not. In re Supoena Duces Tecum To AOL, LLC, No. 1:07mc34, 2008 WL 1956266, at *4 (E.D. Va. Apr. 18, 2008) (holding that the issuance of a civil discovery subpoena is not an exception to the Act that would allow an

internet service provider to disclose communications on third parties to the litigation) (attached as Ex. 11); O'Grady v. Superior Court, 139 Cal. App. 4th 1423, 1447 (2006) (holding that because "the Act makes no exception for civil discovery and no repugnancy has been shown between a denial of such discovery and congressional intent or purpose, the Act must be applied, in accordance with its plain terms, to render unenforceable" civil discovery subpoenas). The court in O'Grady engaged in a lengthy analysis of the Act's history and purpose, and held that it is perfectly consistent with the Act's purpose – to protect the privacy of electronic communications – to disallow civil discovery of the contents of these communications. See also Theofel v. Farey-Jones, 359 F.3d 1066, 1074 (9th Cir. 2004) (holding that a civil discovery subpoena to obtain e-mails was invalid because it "caused disclosure of documents that otherwise would have remained private" and invaded the very interests that the Act seeks to protect).

The eight exceptions to the ban on voluntary disclosure, as well as the Act's provision for required disclosure to certain governmental agencies, are explicitly provided for in the Act. See 18 USC §§ 2702(b), 2703. The legislature carefully considered under what circumstances disclosure of private electronic communications should be permitted, and deliberately did not include civil discovery. Therefore, any disclosure to Stefani in response to the court and sanctioned subpoena was unlawful.

C. The Court Ordered Subpoenas Violated The Stored Communications Act and Kilpatrick's Fourth Amendment Rights

Judge Callhan's orders to Stefani to issue the subpoenas for the purported text messages constituted state action.[5] "A court order, even when issued at the request of a private party in a

[5] Because Stefani is not a governmental entity engaged in a criminal investigation, the court-ordered subpoenas do not meet the exception in 18 U.S.C. 2703(d), which allows for disclosure of stored communications in response to a court order issued in furtherance of such an investigation.

civil lawsuit, constitutes state action and as such is subject to constitutional limitations." Doe v. 2TheMart.com, Inc., 140 F. Supp. 2d 1088, 1091-92 (W.D. Wash. 2001); Mobilisa, Inc. v. Doe, 170 P.3d 712, 717 (Ariz. App. Ct. 2007) (noting that a court order, including the issuance of a discovery order or a subpoena compelling disclosure, is state action that is subject to constitutional restraint); Save Open Space Santa Monica Mountains v. Super. Ct. of Los Angeles County, 84 Cal. App. 4th 235, 252 (2000) (holding that judicial discovery orders inevitably involve state-compelled action where the requested discovery implicates a right to privacy).

Kilpatrick has a reasonable expectation of privacy in any text message communications, as discussed in Section I, A, infra. The court ordered subpoenas allowed for the unlawful disclosure of the text messages purported to be Kilpatrick's private communications. This state-sanctioned, indeed state-ordered, disclosure of Kilpatrick's messages violated his Fourth Amendment rights by exposing his confidential communications without a finding of probable cause. The release of private communications under those circumstances violated both the Stored Communications Act and Kilpatrick's Fourth Amendment rights. Therefore, this evidence must be excluded.

D. Evidence Subsequently Obtained by Worthy is Tainted By the Illegality Of the Court-Sanctioned Subpoenas

Worthy has repeatedly stated that she began her investigation of Kilpatrick after learning about the purported text messages in the newspaper, presumably the Detroit Free Press. Although the Detroit Free Press refuses to identify the source of the purported text messages it published, the possible sources are limited to those who gained knowledge of the purported text messages produced by SkyTel in response to Stefani's court-sanctioned subpoenas.

The settlement agreement in the "whistleblower" lawsuit mandated that Stefani turn over the purported text messages that he obtained pursuant to the fourth subpoena to Kilpatrick's

attorney. (1/30/08 Stefani Dep. Tr. at 61:14-16, Ex. 1.) Stefani has never denied that he provided the text messages to the Detroit Free Press. (Id. at 152:21-24.) Moreover, Stefani has acknowledged that on December 11, 2007, immediately after Judge Callahan put the settlement on record, Judge Callahan met in his chambers with a reporter from the Detroit Free Press, M.L. Elrick. (Id. at 166:8-15; 169:10-21.) Further, the Detroit Free Press published excerpts of purported text messages that were allegedly sent and received during the same time frames requested in the court-sanctioned subpoenas.

Because the unlawful court-sanctioned subpoenas violated Kilpatrick's Fourth Amendment rights, any evidence Worthy obtained as a result of learning of the purported text message communication from the Detroit Free Press should be excluded as fruit of the poisonous tree. Worthy's search was based upon information she learned from the purported text messages unlawfully received by Stefani in violation of the Stored Communications Act and Kilpatrick's constitutional rights, and disclosed to the Detroit Free Press. Therefore, any text messages she received from SkyTel pursuant to the investigative subpoena and from the search warrants must be suppressed.

Moreover, the inevitable discovery exception does not apply. See People v. Thomas, 191 Mich. App. 576, 581 (1991) (evidence that would normally be suppressed under the fruit of the poisonous tree doctrine "may be admissible if the prosecution can show that the same evidence inevitably would have been discovered despite the unlawful police conduct that results in the application of the exclusionary rule"). Worthy would not have discovered the purported text messages if not for the court-sanctioned production by SkyTel which ultimately led to the publication by the Detroit Free Press. Suppression is the only appropriate remedy to prevent the

State from exploiting the illegality which resulted in the publication of the purported text messages by the Detroit Free Press.

III. Evidence Unlawfully Obtained Under the Stored Communications Act Should Be Suppressed

A. Worthy Violated the Stored Communications Act by Obtaining Purported Text Message Communications From SkyTel Pursuant to a Subpoena Without Giving Proper Notice

1. Worthy Failed To Give Prior Notice Before Obtaining the Purported Text Messages

The Stored Communications Act allows for the release of stored electronic communications to the government when certain conditions are met. Under the Act, the government may obtain electronic communications that have been stored for less than 180 days with a valid search warrant. 18 U.S.C. § 2703(a). The government may also obtain the records with prior notice to the customer or subscriber and either an administrative subpoena or a court order pursuant to the Act. 18 U.S.C. § 2703(b)(1)(B)(i)–(ii). The Stored Communications Act does not allow the government to compel disclosure of communications with an investigative subpoena. Therefore, to the extent that Worthy obtained records from SkyTel pursuant to an investigative subpoena, she violated the Act. Moreover, Worthy gave no prior notice of her initial investigative subpoena and thus failed to comply with this requirement of the Act.

2. Worthy Failed to Comply With the Provisions Required for Lawful Delayed Notice

On May 1, 2008, Worthy's office sent a letter to the City of Detroit Law Department entitled "Notice Pursuant To 18 U.S.C.A. 2705." (Ex. 4.) Section 2705 of the Act allows the government to issue an administrative subpoena and delay giving notice for a period not to exceed 90 days "upon the execution of a written certification of a supervisory official that there

is reason to believe that notification of the existence of the subpoena may have an adverse result." 18 U.S.C. § 2705(a)(1)(B). Once the period of delay expires, the government is then required to provide the subscriber or user with a copy of the request as well as notice that states "with reasonable specificity the nature of the law enforcement inquiry," and informs the subscriber or user that:

> (i) that information maintained for such customer or subscriber by the service provider named in such process or request was supplied to or requested by that governmental authority and the date on which the supplying or request took place;
>
> (ii) that notification of such customer or subscriber was delayed;
>
> (iii) what governmental entity or court made the certification or determination pursuant to which that delay was made; and
>
> (iv) which provision of this chapter allowed such delay.

18 U.S.C. § 2705(a)(5)(B). The May 1, 2008 letter sent by Worthy's office to the City of Detroit to the Law Department fails to comply with the delayed notification requirements under the Act. The government never provided a copy of the actual request that was made to SkyTel, nor did it provide information indicating that the notification was delayed, which entity made the required certification, and which provision of Section 2705 allowed for such a delay. Moreover, Worthy never provided notice to Kilpatrick, the user of SkyTel's services, or to the Mayor's officer, the subscriber of such services. These failures are undeniable violations of the Act, rendering Worthy's actions unlawful.

B. The Purported Text Messages Produced By SkyTel To Stefani Without Kilpatrick's Consent And In Violation Of The Stored Communications Act

Under the Stored Communications Act, SkyTel is obligated to maintain the confidentiality of its customers' records. There can be no dispute that SkyTel acted knowingly in turning over the purported text messages to Stefani, who was neither a subscriber nor an

intended recipient of the alleged communications. Moreover, neither Kilpatrick nor the City of Detroit[6] ever consented to the disclosure of the purported text messages. None of the other exceptions which allow for voluntary disclosure of stored electronic communications apply here. See 18 U.S.C. § 2702(b). Therefore, SkyTel violated 18 U.S.C. § 2702(a)(1) and unlawfully produced to Stefani the purported text messages allegedly sent and received by Kilpatrick.

C. The Purported Text Messages Worthy Obtained in Violation of the Stored Communications Act Should be Excluded

The appropriate remedy for communications disclosed in violation of the Stored Communications Act is exclusion from evidence. The Act explicitly allows for criminal penalties and civil remedies for violators other than the United States and for administrative discipline against federal employees. 18 U.S.C. §§ 2701(b), 2707(b). The privacy interests implicated by violations of the Act weigh in favor of excluding unlawfully obtained evidence.

Worthy and Stefani obtained the purported text messages in violation of the Stored Communications Act. The only reasonable remedy for such disregard of the law is exclusion of this evidence. Without the exclusion of this evidence obtained in violation of Kilpatrick's reasonable expectation of privacy, there would be nothing to deter prosecutors and courts from engaging in similar misconduct.

IV. The Text Messages Were Obtained In Violation Of The Wiretap Act

A. SkyTel Produced Messages That Were Contemporaneously Intercepted

The Wiretap Act provides that the interception of wire, electronic, and oral communications are prohibited. 18 U.S.C. § 2511 (2006). At least one court has characterized text messages as "electronic communications." United States v. Jones, 451 F. Supp. 2d 71, 75

[6] Kilpatrick does not concede that consent from the City of Detroit would allow for the lawful release of his private messages.

(D.D.C. 2006). Courts have consistently held that the interception of electronic communications must be contemporaneous with the transmission in order to fall within the definition of an interception under the Wiretap Act. See Fraser v. Nationwide Mutual Ins. Co., 352 F.3d 107, 113-14 (3rd Cir. 2003) (holding that interception of an electronic communication must occur contemporaneously with the transmission and citing to analogous holdings from the Eleventh Circuit, the Ninth Circuit, and the Fifth Circuit).

When SkyTel responded to the subpoenas for Kilpatrick and Beatty's text message communications, they retrieved them from their log files, as opposed to their back-up storage files. When text messages are generated, they are contemporaneously recorded in SkyTel's log files. Thereafter, SkyTel transfers the text messages to a raid array file for back-up. Therefore, the purported text messages that SkyTel produced were contemporaneous interceptions within the meaning of the Wiretap Act. See United States v. Councilman, 418 F.3d 67, 85 (1st Cir. 2005) (holding that "the term 'electronic communication' includes transient electronic storage that is intrinsic to the communication passage, and hence that interception of an e-mail message in such storage is an offense under the Wiretap Act").

B. Pursuant to the Wiretap Act, The Purported Text Messages Must Be Excluded

Under Section 2515 of the Wiretap Act, when a wire or oral communication has been illegally intercepted, no part of the communication, or any evidence derived from it, can be used in evidence in any trial or before any court. 18 U.S.C. § 2515; Gelbard v. United States, 408 U.S. 41, 50-51 (1972). Moreover, this exclusionary rule applies even when the communications are obtained by entirely private conduct. Chandler v. United States, 125 F.3d 1296, 1304 (9th Cir. 1997). There are no exceptions; the government cannot use an intercepted communication or its fruits even though it was not a party to the original illegal interception. Id. at 1302.

Accordingly, Kilpatrick's purported text message communications must be excluded from evidence.

CONCLUSION

For the foregoing reasons, Kilpatrick respectfully requests that this Court grant his motion to suppress any and all evidence text message communications from evidence that were obtained from SkyTel that were allegedly sent or received by Kilpatrick, and any text message communications obtained from Arch Wireless, as well as any testimony related to that evidence or knowledge acquired during a search of that evidence. In the alternative, Kilpatrick respectfully requests that the Court hold an evidentiary hearing on these issues.

WINSTON & STRAWN LLP

_____

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THE COCHRAN FIRM

_____

James W. Parkman III
William C. White II
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505 North 20th Street
Birmingham, AL 35203
205-244-1171

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

DEPUTY CHIEF GARY A. BROWN and
POLICE OFFICER HAROLD C. NELTHROPE

Plaintiffs,

v

JERRY A. OLIVER, SR., Chief of Police, KWAME KILPATRICK, Mayor, Cit y of Detroit, ROBER BERG, Media consultant to The City of Detroit, and the CITY OF DETROIT, a Municipal corporation,

Defendants.

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AMENDED ORDER GRANTING, IN PART, DEFENDANT MAYOR KWAME KILPATRICK'S EMERGENCY MOTION TO QUASH SUBPOENA FOR SKYTEL MESSAGING PAGER AND FOR A PROTECTIVE ORDER

At a session of said Court, held in the Coleman A. Young Municipal Center, City of Detroit, State of Michigan, on SEP 27 2004

PRESENT: HONORABLE MICHAEL J. CALLAHAN
CIRCUIT COURT JUDGE

This matter having come before the Court on Defendant Mayor Kwame Kilpatrick's Emergency Motion to Quash Subpoena for Skytel Messaging Pager and for a Protective Order; and the parties having appeared in Court by and through their respective attorneys; and the Court having heard the arguments of the attorneys on this motion and the Court being otherwise fully advised in the premises;

IT IS ORDERED that Defendant's Motion is granted, in part, and the records sought by Plaintiffs' subpoena dated August 18, 2004 and directed to MCI Subpoena Compliance, c/o Skytel Messaging Pager, Attention: Bill Marsden, 1133 19th Street, NW, Washington, DC 20036 in lieu of the subpoena direction, shall be filed with this Court for an in-camera inspection pursuant to the governmental deliberative-process privilege; and

IT IS FURTHER ORDERED that the contents of the records filed with this Court, in-camera, pursuant to this Order shall be released only upon the further order of this Court upon a determination by this Court that the release of specific information contained therein is appropriate for release.

MICHAEL J. CALLAHAN
CIRCUIT COURT JUDGE

Approved as to Form:

Michael L. Stefani (P20938)
Attorney for Plaintiffs

Samuel E. McCargo (P25298)
Co-Counsel for Defendant Kilpatrick

A TRUE COPY
CATHY M. GARRETT
WAYNE COUNTY CLERK
BY Jean Mason
DEPUTY CLERK

Wilson A. Copeland, II (P23837)
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Valerie Colbert-Osamuede (P42505)
Counsel for Jerry Oliver, Attorney for Jerry Oliver, Sr., Kwame Kilpatrick and the City of Detroit

Laurel F. McGiffert (P31567)
Counsel for Defendant Robert Berg

Thomas M.J. Hathaway (P14745)
Co-Counsel for Defendant Oliver

ATTACHMENT B

COMMENTS OF PROSECUTOR KYM L. WORTHY

59 days ago I told you that the Wayne County Prosecutors Office would conduct a fair and impartial investigation and that we would not be rushed and that only the facts and evidence would lead us.

This is just what we have done. For the men and women in this office, doing things right trumps doing things fast and easy every time. We serve you with independent thought – unbossed and unbought. We have taken orders and instruction from no one. The only body that has told us what to do is the body of the law. We started with clean slates and open minds. We have been careful, deliberate, thoughtful and analytical. Our decision is well reasoned, supported by the evidence, and autonomous.

We reviewed over 40,000 pages of documents that we obtained, talked to many witnesses and put in countless hours. In criminal investigations, one does not simply obtain documents and charge. Real life investigation is very different from a 44-minute legal drama on television.

There have been some obstacles in our way in this investigation - obstacles that have caused delays. I have no problem whatsoever with zealous advocacy. But during an investigation, there are also rules that must be followed and I have no tolerance for deliberate obstruction. I have not said anything about reasons for any delay but now I am going to set the record straight since it came down to a public hearing this morning because of the machinations of the City of Detroit. At every bend and turn there have been attempts by the City through one lawyer or another to block aspects our investigation.

We have had to file Motions to Compel Production of Records; we have had to appear in Circuit Court, respond in the Court of Appeals, and last Friday we had to file paperwork in the Michigan Supreme Court in an attempt to fight to get documents that we subpoenaed on January 31st that still have not been turned over. Some of the documents have been turned over, but we have been told that others have been destroyed or lost. We don't know when or by whom.

Since it became clear to me that the City, through its lawyers, would continue to try to drag their feet and drag our investigation out forever, I made the decision that we would complete our perjury investigation as it relates to Mayor Kilpatrick and Christine Beatty and make that announcement today. Our investigation has led to other potential defendants so we will continue our investigation into their activities.

Let me be very clear. This was not an investigation focused on lying about sex. Gary Brown's, Harold Nelthorpe's and Walter Harris's lives and careers were

forever changed. They were ruined financially and their reputations were completely destroyed because they chose to be dutiful police officers. The public trust was violated. This investigation is about whether public dollars were used unlawfully -and more.

This investigation started because of the Detroit Free Press article on the text messages. The importance of an independent press is vital to our society. But prosecutors are unique – our duties are unique. We have to examine potential evidence from every perspective – upside down, inside out and sideways. We are the ones that have to walk into court and prove all charged cases beyond a reasonable doubt. And we also have to make sure that every defendant receives due process.

In my view, the American system of justice is the best in the world. It is certainly not perfect because the people within it are not perfect. But we try every day to make it work.

We ask a lot of all of the participants in the justice system – we ask a lot of our judges, our jurors, our defense attorneys, the police, courtroom personnel, certainly the prosecutors – but especially our witnesses.

It doesn't matter if it is a criminal or civil case – witnesses are the backbone, heart, core, soul and center of the justice system. Without witnesses the American system of justice would totally collapse. Without witnesses we have nothing, justice means nothing and we can do nothing for anyone. Crime would be rampant as no one would ever be responsible for anything and no civil suit of any kind would stand resolved.

Witnesses must give truthful testimony. And we have to demand that they do. That is why they must take an oath. There are variations on courtroom oaths but basically an oath says:

> I do solemnly swear or affirm that the testimony that I am about to give in this matter is the truth, the whole truth and nothing but the truth.

The oath does not say:

> I do solemnly swear or affirm that the testimony I am about to give in this matter will be some of the truth, when it suits me, some of the time and anything but the whole truth

Oaths mean something. They are critically important. They matter. They matter when jurors take their oaths; they matter when lawyers, judges, and elected officials take their oaths; they matter when new citizens take the oath of

citizenship; they matter when doctors take the Hippocratic Oath; they matter when anyone swears before a notary public. They must matter and that is why witnesses take them – every witness in every case. And it is so important; it is perjury if there is lying and perjury is a crime.

You know the fundamental principles of the justice system are fairly simple – they aren't hard. We learned them all as children:

Tell the truth
Take responsibility for your actions
Admit when you are wrong
Be fair and play fair
Don't take or use things that aren't yours
There are consequences for bad behavior

Even children understand that lying is wrong. If a witness lies, innocent people can go to jail or prison, people can literally get away with murder, civil litigants who deserve money may not get it or may get money they don't deserve. And lying cannot be tolerated even if a judge or jury sees through it.

We ask witnesses to come in and risk their lives in drive-by shooting cases and then return to the neighborhoods they came from; we ask witnesses to testify against multi-national corporations; we ask witnesses to do all kinds of things to support our cases.

How can we look another witness in the eye and ask them to come in and do these things if we do not follow the law for witnesses who lie under oath – even if they are parties to lawsuits – and demand that these witnesses follow the law and give truthful testimony? No matter what a particular witness's stature may be.

Some have suggested that the issues before us are personal or private. Our investigation has clearly shown that public dollars were used, people's lives were ruined, the justice system was severely mocked, and the public trust trampled on. This case is about as far from being a private matter as one can get.

Honesty and integrity in the justice system is everything. That is what this decision is about.

Just when did honesty, integrity. truth and honor become traits to be mocked or downplayed or ignored or laughed at or excuses made for them? When did telling the truth become a supporting player to everything else?

The Roman Goddess of Justice is the idealization of the moral force that underlies the legal system. She is most often depicted with a set of weighing scales typically suspended from her left hand upon which she measures the

strengths of a case's support and opposition. She is also often seen carrying a double-edged sword in her right hand, symbolizing the power of Reason and Justice, which may be wielded either for or against any party.

She is almost always draped in flowing robes, symbolizing the fair and equal administration of the law without corruption, avarice, prejudice, or favor.

The blindfold she wears does not mean that we turn a blind eye or give a wink and a nod to crimes committed, no matter how inconsequential they may seem to some, by a person who has means, political power, a name or influence. If that is done, the process is not fair or impartial. Lady Justice wears a blindfold to indicate that justice should be meted out objectively, without fear or favor, regardless of the identity or power of the accused.

President Theodore Roosevelt once said, "No man is above the law and no man is below it; nor do we ask any man's permission when we require him to obey it. Obedience to the law is demanded as a right; not asked as a favor."

IN THIS CASE WE ASKED:

1. Can we charge perjury? Yes.

2. Are there other crimes or offenses that we can charge beside perjury? Yes.

3. Should we charge? Yes.

THE CHARGES:

(See Attachment A)

THE PROSECUTION TEAM:

I have assembled a team of excellent trial prosecutors to handle this unique case.

Lisa Lindsey – is a Lead Attorney and is specially assigned to me to try high profile and complex cases. She has been trying criminal cases for 21 years

Robert Moran – is the Principal Attorney in charge of the Homicide Unit and one of the most brilliant legal and trial strategists in my office. He has been trying cases for 15 years

ATTACHMENT B

Athina Siringas – is a member of the Homicide Unit, tried civil cases for 17 years and has been with this office for seven years

Robert Spada – is the Principal Attorney in our Forfeiture Unit and has been trying criminal and civil asset forfeiture for 17 years

I also want to thank my Chief of Research and Appeals, Mr. Timothy Baughman, for his invaluable work on this case and my Chief of Investigations, James Bivens, and his team for all of their work.

This is a very sad day for the City of Detroit, the County of Wayne and for the State of Michigan. We certainly take no joy or pleasure in this. But it would be much sadder still if true justice were ignored.

PROCESSING OF KILPATRICK AND BEATTY

When defendants are not in custody and the identity of their lawyers are known to the prosecution, it is our procedure to contact their attorneys and inform them of pending criminal charges. I have spoken briefly to the lawyers for Mayor Kilpatrick and former Chief of Staff, Christine Beatty. I indicated to them that we were charging their clients and that I fully expect Mayor Kilpatrick and Ms. Beatty to turn themselves in no later than 7:00 a.m. tomorrow morning.

KYM L. WORTHY
PROSECUTING ATTORNEY

RICHARD P. HATHAWAY
CHIEF ASSISTANT

DONN FRESARD
CHIEF OF STAFF

COUNTY OF WAYNE
OFFICE OF THE PROSECUTING ATTORNEY
DETROIT, MICHIGAN

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DETROIT, MICHIGAN 48226-2302

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May 1, 2008

RECEIVED
MAY 2 - 2008
CITY OF DET
LAW DEP
JOHN E. JO

John E. Johnson
Corporation Counsel
City of Detroit Law Department
660 Woodward Ave. Suite 1650
Detroit, Michigan 48226

RE: NOTICE PURSUANT TO 18 U.S.C.A 2705.

Dear Mr. Johnson,

Without waiving any argument as to the application of the above Act, Notification is hereby given that the Wayne County Prosecutor's office has received certain information from Skytel relating the City of Detroit account including the following:

1. On February 4 2008 copies of the billing screen and output form SkyTel showing two pager/PINs assigned to Christine Beatty and the CD containing all messages sent from and to 8774615902 and 8884679147.
2. On February 11, 2008 a CD containing all messages associated with PIN 8773384349.
3. On February 15, 2008 a CD of all messages associated with PIN 4677164.
4. On February 14, 2008 requested a CD of all messages associated with PIN 8774813934.

Sincerely,

Rob Moran
Assistant Prosecuting Attorney

State Of Michigan
County of Wayne SS

SEARCH WARRANT & AFFIDAVIT
Page 1 of 5 Pages

TO THE SHERIFF OR ANY PEACE OFFICER OF SAID COUNTY:

Detective Brian White
Badge# 940

Affiant, having subscribed and sworn to an affidavit for a Search Warrant, and I having under oath examined affiant, am satisfied that probable cause exists:

THEREFORE, IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN, I COMMAND THAT YOU SEARCH THE FOLLOWING DESCRIBED PLACES:

KEEPER OF THE RECORDS
Search Warrant Compliance
SkyTel and or Bell Industries
819 Taylor Street, Fort Worth, Texas 76102
and or their resident agent within the State of Michigan
Registered Agent: The Corporation Company
30600 Telegraph Rd, Bingham Farms MI 48025

and **seize**, secure, tabulate and make return according to law the following property and things:

A) All Sky Writer text messages (SMS) for the following telephone number/ ANI/ IP number from June 1st 2002 to January 30th 2008.

1.	8885847290	7.	8883995980	13.	8885617627
2.	8885847282	8.	8885098246		
3.	8884677167	9.	8774813934		
4.	8885279077	10.	8884677164		
5.	8884239922	11.	8884679147		
6.	8772506926	12.	8774615902		

B) All contracts or leasing agreements in existence between 2002 and 2007 between the City of Detroit and SkyTel / Bell Industries

C) Provide any and all investigative notes or records that SkyTel and or Bell Industries has generated in regards to the City of Detroit accounts with SkyTel / Bell Industries

Return all Certified copies to
Frank Murphy Hall Of Justice
Wayne County Prosecutors Office
Special Investigations Unit
Detective Brian White
1441 St Antoine
12th Floor
Detroit MI 48226

The following facts are sworn to by affiant in support of the issuance of this warrant:

1. The Affiant has been employed by the Wayne County Sheriff's Department for the past 20 years and has been a Detective for over 5 years. The Affiant is currently assigned to the Wayne County Prosecutor's Office Investigation Unit and is charged with investigating crimes occurring within the County of Wayne.

2. The Affiant is currently investigating a Perjury, Conspiracy, Obstruction of Justice, and Misconduct in office case where the complainant is the County of Wayne /State of Michigan and the offenses occurred from June 1st 2002 to January 30th 2008.

3. On August 29, 2007, while testifying under oath, Detroit Mayor Kwame Kilpatrick repeatedly denied that he had a sexual relationship with his then Chief of Staff, Christine Beatty. The issue was material to claims by the Plaintiffs, former Detroit Police Officers, in the case of Gary Brown et al vs City of Detroit and Mayor Kwame Kilpatrick, Circuit Court Case no. 03-317557NZ.. The Plaintiffs accused Mayor Kilpatrick and Christine Beatty of retaliation, including being terminated from city employment, in part because of what these officers knew about Kilpatrick's private conduct, specifically an alleged extra martial relationship between Mayor Kilpatrick and Christine Beatty.

4. In recent months the The Detroit Free Press has published numerous text messages retained by SkyTel Corp., involving Mayor Kwame Kilpatrick and his Chief of Staff, Christine Beatty. Investigation has revealed that Kilpatrick and Beatty were issued Sky Tel paging devices by the City of Detroit to be used during the course of their employment. These pagers were used by Beatty and Kilpatrick and the messages between the two reveal hundreds of conversations between Christine Beatty and Mayor Kilpatrick discussing among other things their personal, romantic and sexual relationship, the trips taken by the two of them, as well as the nature of Plaintiff Gary Browns termination from employment. The pager Pin/ANI/IP numbers assigned to Mayor Kwame Kilpatrick for the time periods requested are: 8774813934 and 8884677164. Christine Beatty was assigned pager Pin/ANI/IP numbers: 8884679147 and 8774615902.

5. On March 24, 2008, Kwame Kilpatrick and Christine Beatty were charged with a twelve count felony warrant, the charges include Conspiracy, Obstruction of Justice, Misconduct in Office and Perjury. On that same date affiant presented Magistrate Stephen Lockhart with the complaint and warrant and it was reviewed by the magistrate. Magistrate Lockhart found probable cause for the issuance of the charges and signed the felony complaint and warrant.

6. During the investigation of this case it was revealed that several individuals/employees from the Mayor's Office, City of Detroit Corporation Counsel and the First Lady Carlita Kilpatrick were also issued Sky Tel text paging devices. Further these text paging devices were in use by these individual during the same

time period that Kilpatrick and Beatty were also using their text paging devices. Investigation has confirmed that these text paging devices were used by them to communicate with Kilpatrick and Beatty and each other to discuss issues relevant to the criminal case pending against Kwame Kilpatrick and Christine Beatty, including but not limited to the termination of Gary Brown, perjury and/or obstruction of justice and/or misconduct in office and the related ongoing conspiracy. The investigation has revealed that the following individuals/employees have used their Sky Tel text paging devices to receive and or send messages that are relevant to this investigation and the pending criminal charges: Ruth Carter, from the City of Detroit Corporation Counsel pager Pin/ANI/IP number: 8885847282; Brenda Braceful from the City of Detroit Corporation Counsel pager Pin/ANI/IP numbers: 8885847290; Derrick Miller, from the Mayor's Executive Staff, pager Pin/ANI/IP number 8884677167, Ires Ojeda from the Mayor's Executive Staff, pager Pin/ANI/IP number 8884239922, Patricia Peoples, Deputy Chief of Staff, pager Pin/ANI/IP numbers 8772506926 and 8883995980, Misty Evans, Office Manager for the Mayor's Office pager Pin/ANI/IP number 8885098246,First Lady Carlita Kilpatrick pager Pin/ANI/IP number 8885279077 and Kandia Milton, Mayor's Executive Staff pager Pin/ANI/IP number 8885617627.

7. Investigation has revealed that in November 2007, William Mitchell, an attorney representing Mayor Kilpatrick met with representatives from Skytel, including Wendy Mullins, Skytel's legal counsel to determine if Skytel could destroy The City of Detroit's Skytel information, including the records sought herein. In this William Mitchell sent Skytel correspondence specifically asking that records be destroyed and later asked if they can not be destroyed can they at least be scrambled so they cannot be deciphered. The City of Detroit, through Patricia Peoples and John Johnson, claims it has destroyed all records pertaining to the Skytel communication devices and can not produced any such records. The additional records are necessary to authenticate and corroborate the content of the text message communications sent by Beatty and Kilpatrick

8. Wherefore the Affiant believes that probable cause exists to obtain a search warrant for the aforementioned records.

Affiant Brian Whitt

Subscribed and sworn before me and issued under my hand this 2nd day of April 2008.
Approved:

P35761
Assistant Prosecuting Attorney
NOA SIBLIN GAS

Judge of the County of Wayne

State Of Michigan
County of Wayne SS

SEARCH WARRANT & AFFIDAVIT
Page __4__ of ___5___Pages

REQUEST AND ORDER TO SUPPRESS SEARCH WARRANT AFFIDAVIT AND TABULATION

This request for suppression of an affidavit and tabulation for search warrant pursuant to MCL 780.654(3) and MCL 780.655(2) is being made on behalf of the police/prosecutor who are:

[X] presenting this request to suppress with an original affidavit, warrant and tabulation

or

[ ] presenting this request for extension of a previous order of suppression issued on:

_____.

The warrant requested/issued is for a search of: SkyTel and Or Bell Industries

It is hereby requested that the affidavit and tabulation be suppressed in order to protect an ongoing investigation and/or the safety and privacy of persons identified in said affidavit.

Additional facts in support of this request are (where appropriate/necessary):
Perjury , Obstruction of Justice, Misconduct in Office and Conspiracy involving the Mayor Kwame Kilpatrick and Christine Beatty ET.AL

Dated: _____

_____
Signature of police officer/prosecutor making request
Detective Brian White

Subscribed and sworn to before me on: _____

_____
Signature of Judge Bar Number

ORDER SUPRESSING AFFIDAVIT

The court having reviewed the affidavit and request for warrant and request for suppression of affidavit from which it satisfactorily appears that suppression of the affidavit is necessary to protect an ongoing investigation and/or the safety and privacy of persons identified in the affidavit,

IT IS HEREBY ORDERED that the aforesaid affidavit and tabulation be:

[X] Suppressed for the period of 55 days from the date of the Order (for original request).

Or

[ ] Suppressed until: _____
(for extension of extension order)

or until the further order of the court having jurisdiction over criminal charges filed in connection with these matters.

Dated: _____

_____
Signature of Judge Bar Number

State Of Michigan
County of Wayne SS

SEARCH WARRANT & AFFIDAVIT
Page 1 of 6 Pages

TO THE SHERIFF OR ANY PEACE OFFICER OF SAID COUNTY:

Detective Brian White
Badge# 940

Affiant, having subscribed and sworn to an affidavit for a Search Warrant, and I having under oath examined affiant, am satisfied that probable cause exists:

THEREFORE, IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN, I COMMAND THAT YOU SEARCH THE FOLLOWING DESCRIBED PLACES:

KEEPER OF THE RECORDS
Search Warrant Compliance
SkyTel and Bell Industries, Michigan Corporation ID Number 624192
P.O. Box 23066 Jackson MS 39225
and their resident agent within the State of Michigan
Registered Agent: The Corporation Company,
30600 Telegraph Rd, Bingham Farms MI 48025

and **seize**, secure, tabulate and make return according to law the following property and things:

A) *All* Sky Writer text messages (SMS) for the following telephone number/ ANI/ IP number from June 1st 2002 to January 30th 2008.

1. **877-338-4349**
2. **888-464-3899**

B) All contracts or leasing agreements in existence between 2002 and 2007 between the City of Detroit and SkyTel / Bell Industries

C) Provide any and all investigative notes or records that SkyTel and or Bell Industries has generated in regards to the City of Detroit accounts with SkyTel / Bell Industries

Return all Certified copies to
Frank Murphy Hall Of Justice
Wayne County Prosecutors Office
Special Investigations Unit
Detective Brian White
1441 St Antoine
12th Floor
Detroit MI 48226

KIM L. WORTHY
PROSECUTING ATTORNEY

COUNTY OF WAYNE
OFFICE OF THE PROSECUTING ATTORNEY
DETROIT, MICHIGAN 48226

FRANK MURPHY HALL OF JUSTICE
1441 ST. ANTOINE STREET
TEL. (313) 224-5777

The following facts are sworn to by affiant in support of the issuance of this warrant:

1. The Affiant has been employed by the Wayne County Sheriff's Department for the past 20 years and has been a Detective for over 5 years. The Affiant is currently assigned to the Wayne County Prosecutor's Office Investigation Unit and is charged with investigating crimes occurring within the County of Wayne.

2. The Affiant is currently investigating a Perjury, Conspiracy, Obstruction of Justice, and Misconduct in office case where the complainant is the County of Wayne /State of Michigan and the offenses occurred from June 1st 2002 to January 30th 2008.

3. On August 29, 2007, while testifying under oath, Detroit Mayor Kwame Kilpatrick repeatedly denied that he had a sexual relationship with his then Chief of Staff, Christine Beatty. The issue was material to claims by the Plaintiffs, former Detroit Police Officers, in the case of Gary Brown et al vs. City of Detroit and Mayor Kwame Kilpatrick, Circuit Court Case no. 03-317557NZ. The Plaintiffs accused Mayor Kilpatrick and Christine Beatty of retaliation, including being terminated from city employment, in part because of what these officers knew about Kilpatrick's private conduct, specifically an alleged extra martial relationship between Mayor Kilpatrick and Christine Beatty.

4. In recent months the Detroit Free Press has published numerous text messages retained by SkyTel Corp., involving Mayor Kwame Kilpatrick and his Chief of Staff, Christine Beatty. Investigation has revealed that Kilpatrick and Beatty were issued Sky Tel paging devices by the City of Detroit to be used during the course of their employment. These pagers were used by Beatty and Kilpatrick and the messages between the two reveal hundreds of conversations between Christine Beatty and Mayor Kilpatrick discussing among other things their personal, romantic and sexual relationship, the trips taken by the two of them, as well as the nature of Plaintiff Gary Browns termination from employment. The pager Pin/ANI/IP numbers assigned to Mayor Kwame Kilpatrick for the time periods requested are: 8774813934 and 8884677164. Christine Beatty was assigned pager Pin/ANI/IP numbers: 8884679147 and 8774615902.

5. On March 24, 2008, Kwame Kilpatrick and Christine Beatty were charged with a twelve-count felony warrant, the charges include Conspiracy, Obstruction of Justice, Misconduct in Office and Perjury. On that same date affiant presented Magistrate Stephen Lockhart with the complaint and warrant and the magistrate reviewed it. Magistrate Lockhart found probable cause for the issuance of the charges and signed the felony complaint and warrant.

KIM L. WORTHY
PROSECUTING ATTORNEY

COUNTY OF WAYNE
OFFICE OF THE PROSECUTING ATTORNEY
DETROIT, MICHIGAN 48226

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6. During the investigation of this case it was revealed that several individuals/employees from the Mayor's Office, City of Detroit Corporation Counsel and the First Lady Carlita Kilpatrick were also issued Sky Tel text paging devices. Further these text paging devices were in use by these individual during the same time period that Kilpatrick and Beatty were also using their text paging devices. Investigation has confirmed that these text paging devices were used by them to communicate with Kilpatrick and Beatty and each other to discuss issues relevant to the criminal case pending against Kwame Kilpatrick and Christine Beatty, including but not limited to the termination of Gary Brown, perjury and/or obstruction of justice and/or misconduct in office and the related ongoing conspiracy. The investigation has revealed that the following individuals/employees have used their Sky Tel text paging devices to receive and or send messages that are relevant to this investigation and the pending criminal charges: Ruth Carter, from the City of Detroit Corporation Counsel pager Pin/ANI/IP number: 8885847282; Brenda Braceful from the City of Detroit Corporation Counsel pager Pin/ANI/IP numbers: 8885847290; Derrick Miller, from the Mayor's Executive Staff, pager Pin/ANI/IP number 8884677167, Ires Ojeda from the Mayor's Executive Staff, pager Pin/ANI/IP number 8884239922, Patricia Peoples, Deputy Chief of Staff, pager Pin/ANI/IP numbers 8772506926 and 8883995980, Misty Evans, Office Manager for the Mayor's Office pager Pin/ANI/IP number 8885098246,First Lady Carlita Kilpatrick pager Pin/ANI/IP number 8885279077 and Kandia Milton, Mayor's Executive Staff pager Pin/ANI/IP number 8885617627.

7. Investigation has revealed that in November 2007, William Mitchell, an attorney representing Mayor Kilpatrick met with representatives from Skytel, including Wendy Mullins, Skytel's legal counsel to determine if Skytel could destroy The City of Detroit's Skytel information, including the records sought herein. in this William Mitchell sent Skytel correspondence specifically asking that records be destroyed and later asked if they cannot be destroyed can they at least be scrambled so they cannot be deciphered. The City of Detroit, through Patricia Peoples and John Johnson, claims it has destroyed all records pertaining to the Skytel communication devices and can not produced any such records. The additional records are necessary to authenticate and corroborate the content of the text message communications sent by Beatty and Kilpatrick

8. Review of many of the text messages received from the original search warrant revealed that Bernard Kilpatrick, father of Mayor Kawme Kilpatrick had a City of Detroit SkyTel pager issued to him. Obtaining Bernard Kilpatrick text message records, will assist in establishing corroboration in other text messages received in the original search warrant. The pager number issued to Bernard Kilpatrick as reflected by the SkyTel user list during the time period requested is Pin/ANI/IP number: 8884643899

KIM L. WORTHY
PROSECUTING ATTORNEY

COUNTY OF WAYNE
OFFICE OF THE PROSECUTING ATTORNEY
DETROIT, MICHIGAN 48226

FRANK MURPHY HALL OF JUSTICE
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TEL. (313) 224-5777

9. Further review of documents obtained from SkyTel in the original search warrant, revealed that Christine Beatty had a third City of Detroit SkyTel pager issued to her that she used to send and receive text messages. Obtaining Christine Beatty's text message records will assist in establishing corroboration in other text messages received in the original search warrant. The pager number issued to Christine Beatty as reflected by the SkyTel user list during the time period requested is Pin/ANI/IP number: 8773384349

10. 18 U.S.C.A. 2703 states, a government entity may require the disclosure by a provider of electronic communication service of the contents of a wire or electronic communication.... by a court with jurisdiction over the offense under investigation or equivalent State warrant. Therefore the Affiant believes that probable cause exists to obtain a search warrant for the aforementioned records.

Affiant _____

Subscribed and sworn before me and issued under my hand this 1st day of May 2008.
Approved:

_____ P35761
Assistant Prosecuting Attorney

_____
Judge of the County of Wayne

KIM L. WORTHY
PROSECUTING ATTORNEY

COUNTY OF WAYNE
OFFICE OF THE PROSECUTING ATTORNEY
DETROIT, MICHIGAN 48226

FRANK MURPHY HALL OF JUSTICE
1441 ST. ANTOINE STREET
TEL. (313) 224-5777

REQUEST AND ORDER TO SUPPRESS SEARCH WARRANT AFFIDAVIT AND TABULATION

This request for suppression of an affidavit and tabulation for search warrant pursuant to MCL 780.654(3) and MCL 780.655(2) is being made on behalf of the police/prosecutor who are:

[X] presenting this request to suppress with an original affidavit, warrant and tabulation

or

[ ] presenting this request for extension of a previous order of suppression issued on:

_____.

The warrant requested/issued is for a search of: SkyTel and Or Bell Industries

It is hereby requested that the affidavit and tabulation be suppressed in order to protect an ongoing investigation and/or the safety and privacy of persons identified in said affidavit.

Additional facts in support of this request are (where appropriate/necessary):
Perjury , Obstruction of Justice, Misconduct in Office and Conspiracy involving the Mayor Kwame Kilpatrick and Christine Beatty ET.AL

Dated: _____

_____
Signature of police officer/prosecutor making request
Detective Brian White

Subscribed and sworn to before me on: _____

_____
Signature of Judge Bar Number

KIM L. WORTHY
PROSECUTING ATTORNEY

COUNTY OF WAYNE
OFFICE OF THE PROSECUTING ATTORNEY
DETROIT, MICHIGAN 48226

FRANK MURPHY HALL OF JUSTICE
1441 ST. ANTOINE STREET
TEL. (313) 224-5777

ORDER SUPRESSING AFFIDAVIT

The court having reviewed the affidavit and request for warrant and request for suppression of affidavit from which it satisfactorily appears that suppression of the affidavit is necessary to protect an ongoing investigation and/or the safety and privacy of persons identified in the affidavit,

IT IS HEREBY ORDERED that the aforesaid affidavit and tabulation be:

[X] Suppressed for the period of 55 days from the date of the Order (for original request).

Or

[ ] Suppressed until: _____
(for extension of extension order)

or until the further order of the court having jurisdiction over criminal charges filed in connection with these matters.

Dated: _____

_____
Signature of Judge Bar Number

KIM L. WORTHY
PROSECUTING ATTORNEY

COUNTY OF WAYNE
OFFICE OF THE PROSECUTING ATTORNEY
DETROIT, MICHIGAN 48226

FRANK MURPHY HALL OF JUSTICE
1441 ST. ANTOINE STREET
TEL. (313) 224-5777

State Of Michigan
County of Wayne SS

SEARCH WARRANT & AFFIDAVIT
Page _1__ of ___4___Pages

TO THE SHERIFF OR ANY PEACE OFFICER OF SAID COUNTY:
Detective Brian White Badge# 940

Affiant, having subscribed and sworn to an affidavit for a Search Warrant, and I having under oath examined affiant, am satisfied that probable cause exists:

THEREFORE, IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN, I COMMAND THAT YOU SEARCH THE FOLLOWING DESCRIBED PLACES:

KEEPER OF THE RECORDS
Search Warrant Compliance Manager Attention: Kim Edwards
USA Mobility Wireless, Inc
3000 Technology Drive Suite 400
Plano, Texas 75074
And their registered agent within the State of Michigan
USA Mobility Wireless, Inc 646893
Registered Agent: CSC-Lawyers Incorporating Service
601 Abbott Road, East Lansing, Mi 48823

and **seize**, secure, tabulate and make return according to law the following property and things:

A) *All* Arch Wireless text messages/phone records for the following telephone numbers from June 1st 2002 to January 30th 2008.

1. **8662770349**
2. **8004794717**
3. **8004794721**
4. **8775307941**
5. **8884343507**
6. **8883524890**
7. **8005397805**
8. **8775959342**
9. **8774813934**
10. **8776956560**
11. **8006368830**

B) All contracts or leasing agreements in existence between 2002 and 2008 between the City of Detroit and Arch Wireless.

C) Provide any and all investigative notes or records/subscriber information that Arch Wireless has generated or received in regards to the City of Detroit accounts with Arch Wireless, and any documents authenticating the parties who had possession of the texting/pager devices.

Return all Certified copies to
Frank Murphy Hall Of Justice
Wayne County Prosecutors Office
Special Investigations Unit
Detective Brian White
1441 St Antoine
12th Floor
Detroit MI 48226

The following facts are sworn to by affiant in support of the issuance of this warrant:

1. The Affiant has been employed by the Wayne County Sheriff's Department for the past 20 years and has been a Detective for over 5 years. The Affiant is currently assigned to the Wayne County Prosecutor's Office Investigation Unit and is charged with investigating crimes occurring within the County of Wayne.

2. The Affiant is currently investigating a Perjury, Conspiracy, Obstruction of Justice, and Misconduct in Office case where the complainant is the County of Wayne /State of Michigan and the offenses occurred from June 1st 2002 to January 30th 2008.

3. On August 29, 2007, while testifying under oath, Detroit Mayor Kwame Kilpatrick repeatedly denied that he had a sexual relationship with his then Chief of Staff, Christine Beatty. The issue was material to claims by the Plaintiffs, former Detroit Police Officers, in the case of Gary Brown et al vs City of Detroit and Mayor Kwame Kilpatrick, Circuit Court Case no. 03-317557NZ.. The Plaintiffs accused Mayor Kilpatrick and Christine Beatty of retaliation, including being terminated from city employment, in part because of what these officers knew about Kilpatrick's private conduct, specifically an alleged extra martial relationship between Mayor Kilpatrick and Christine Beatty.

4. In recent months the The Detroit Free Press has published numerous text messages retained by SkyTel Corp., involving Mayor Kwame Kilpatrick and his Chief of Staff, Christine Beatty. Investigation has revealed that Kilpatrick and Beatty were issued Sky Tel paging devices by the City of Detroit to be used during the course of their employment. These pagers were used by Beatty and Kilpatrick and the messages between the two reveal hundreds of conversations between Christine Beatty and Mayor Kilpatrick discussing among other things their personal, romantic and sexual relationship, the trips taken by the two of them, as well as the nature of Plaintiff Gary Browns termination from employment. The pager Pin/ANI/IP numbers assigned to Mayor Kwame Kilpatrick for the time periods requested are: 8774813934 and 8884677164. Christine Beatty was assigned pager Pin/ANI/IP numbers: 8884679147 and 8774615902.

5. On March 24, 2008, Kwame Kilpatrick and Christine Beatty were charged with a twelve-count felony warrant, the charges include Conspiracy, Obstruction of Justice, Misconduct in Office and Perjury. On that same date affiant presented Magistrate Stephen Lockhart with the complaint and warrant and the magistrate reviewed it. Magistrate Lockhart found probable cause for the issuance of the charges and signed the felony complaint and warrant.

6. During the investigation of this case it was revealed that several individuals/employees from the Mayor's Office, City of Detroit Corporation Counsel and the First Lady Carlita Kilpatrick were also issued Sky Tel text paging devices and various individuals from the Detroit Police Department and the Mayor's Office and the Mayor's Executive Protection Unit were issued Arch Wireless text paging

devices. Further these text-paging devices were in use by these individuals during the time period that Kilpatrick and Beatty were also using their text paging devices. A review of the Skytel text messages has confirmed that these Arch Wireless text/paging devices were used by them to communicate with Kilpatrick and Beatty and each other to discuss issues relevant to the criminal case pending against Kwame Kilpatrick and Christine Beatty, including but not limited to the termination of Gary Brown, perjury and/or obstruction of justice and/or misconduct in office and the related ongoing conspiracy. Review of the Skytel text messages has revealed that the following individuals/employees have used their Arch Wireless text paging/phone devices to receive and or send messages that are relevant to this investigation and the pending criminal charges: Ayanna Kilpatrick, relative of Kwame Kilpatrick, Arch Wireless text pager/phone number: 8662770349; Michael Martin, Mayor's Executive Protection Unit, Arch Wireless text pager/phone number: 8004794717; Loronzo Greg Jones, Mayor's Executive Protection Unit, Arch Wireless text pager/phone number: 8004794721; Shereece Fleming, Detroit Police Department, Chief's Office, Arch Wireless text pager/phone number: 8775307941; Ella Bully Cummings, Detroit Police Department, Assistant Chief of Police (Present Chief of Police), Arch Wireless text pager/phone number: 8884343507; Jamaine Dickens, Mayor's Executive Staff, Arch Wireless text pager/phone number: 8883524890; Jerry Oliver, then Chief of Police, Detroit Police Department, Arch Wireless text pager/phone number: 8005397805; Matthew Schenk, Mayor's Executive Staff, Arch Wireless text pager/phone number: 8775959342; Walter Shoulders, Assistant Chief, Detroit Police Department, Arch Wireless text pager/phone number: 8776956560; Kenneth Williams, Mayor's Executive Protection Unit, Arch Wireless text pager/phone number: 8006368830.

7. In November 2007, William Mitchell, an attorney representing Mayor Kilpatrick met with representatives from Skytel, including Wendy Mullins, Skytel's legal counsel to determine if Skytel could destroy The City of Detroit's Skytel information, including the text messages received from the Arch Wireless text/pagers. William Mitchell sent Skytel correspondence specifically asking that records be destroyed and later asked if they cannot be destroyed can they at least be scrambled so they cannot be deciphered. The City of Detroit, through Patricia Peoples and John Johnson, claims it has destroyed all records pertaining to the Skytel communication devices and cannot produce any such records. The additional Arch Wireless records are necessary to authenticate and corroborate the content of the text message communications sent by Beatty and Kilpatrick and may reveal further evidence of the above enumerated crimes.

8. 18 U.S.C.A. 2703 states, a government entity may require the disclosure by a provider of electronic communication service of the contents of a wire or electronic communication.... by a court with jurisdiction over the offense under investigation or equivalent State warrant. Therefore the Affiant believes that probable cause exists to obtain a search warrant for the aforementioned records.

State Of Michigan
County of Wayne SS

SEARCH WARRANT & AFFIDAVIT
Page _4__ of ___4___Pages

Affiant

Subscribed and sworn before me and issued under my hand this 8th day of May 2008.
Approved:

Assistant Prosecuting Attorney
APA SIGNS
P35761

Judge of the County of Wayne

LEXSEE

JERILYN QUON; APRIL FLORIO; JEFF QUON; STEVE TRUJILLO, Plaintiffs-Appellants, v. ARCH WIRELESS OPERATING COMPANY, INCORPORATED, a Delaware corporation; CITY OF ONTARIO, a municipal corporation; LLOYD SCHARF, individually and as Chief of Ontario Police Department; ONTARIO POLICE DEPARTMENT; DEBBIE GLENN, individually and as a Sergeant of Ontario Police Department, Defendants-Appellees.

No. 07-55282

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

2008 U.S. App. LEXIS 12766

February 6, 2008, Argued and Submitted, Pasadena, California
June 18, 2008, Filed

PRIOR HISTORY: [*1]

Appeal from the United States District Court for the Central District of California. D.C. No. CV-03-00199-SGL. Stephen G. Larson, District Judge, Presiding.
Quon v. Arch Wireless Operating Co., 445 F. Supp. 2d 1116, 2006 U.S. Dist. LEXIS 61612 (C.D. Cal., 2006)

COUNSEL: Dieter C. Dammeier, Zahra Khoury, Lackie & Dammeier APC, Upland, California, for the plaintiffs-appellants.

Dimitrios C. Rinos, Rinos & Martin, LLP, Tustin, California; Kent L. Richland, Kent J. Bullard, Greines, Martin, Stein & Richland LLP, Los Angeles, California, for defendants-appellees City of Ontario, Ontario Police Department, and Lloyd Scharf.

Bruce E. Disenhouse, Kinkle, Rodiger and Spriggs, Riverside, California, for defendant-appellee Debbie Glenn.

John H. Horwitz, Schaffer, Lax, McNaughton & Chen, Los Angeles, California, for defendant-appellee Arch Wireless, Inc.

JUDGES: Before: Harry Pregerson and Kim McLane Wardlaw, Circuit Judges, and Ronald B. Leighton, * District Judge.

* The Honorable Ronald B. Leighton, United States District Judge for the Western District of Washington, sitting by designation.

OPINION BY: Kim McLane Wardlaw

OPINION

WARDLAW, Circuit Judge:

This case arises from the Ontario Police Department's review of text messages sent and received by Jeff Quon, a Sergeant and member of the City of Ontario's SWAT team. We must decide whether [*2] (1) Arch Wireless Operating Company Inc., the company with whom the City contracted for text messaging services, violated the Stored Communications Act, *18 U.S.C. §§ 2701-2711 (1986)*; and (2) whether the City, the Police Department, and Ontario Police Chief Lloyd Scharf violated Quon's rights and the rights of those with whom he "texted"--Sergeant Steve Trujillo, Dispatcher April Florio, and his wife Jerilyn Quon [1] --under the *Fourth Amendment to the United States Constitution* and *Article I, Section 1 of the California Constitution.*

1 Doreen Klein, a plaintiff below, has not filed an appeal.

I. FACTUAL BACKGROUND

On October 24, 2001, Arch Wireless ("Arch Wireless") contracted to provide wireless text-messaging services for the City of Ontario. The City received twenty two-way alphanumeric pagers, which it distributed to its employees, including Ontario Police Department ("OPD" or "Department") Sergeants Quon and Trujillo, in late 2001 or early 2002.

According to Steven Niekamp, Director of Information Technology for Arch Wireless:

> A text message originating from an Arch Wireless two-way alphanumeric

text-messaging pager is sent to another two-way text-messaging pager as follows: The message [*3] leaves the originating pager via a radio frequency transmission. That transmission is received by any one of many receiving stations, which are owned by Arch Wireless. Depending on the location of the receiving station, the message is then entered into the Arch Wireless computer network either by wire transmission or via satellite by another radio frequency transmission. Once in the Arch Wireless computer network, the message is sent to the Arch Wireless computer server. Once in the server, a copy of the message is archived. The message is also stored in the server system, for a period of up to 72 hours, until the recipient pager is ready to receive delivery of the text message. The recipient pager is ready to receive delivery of a message when it is both activated and located in an Arch Wireless service area. Once the recipient pager is able to receive delivery of the text message, the Arch Wireless server retrieves the stored message and sends it, via wire or radio frequency transmission, to the transmitting station closest to the recipient pager. The transmitting stations are owed [sic] by Arch Wireless. The message is then sent from the transmitting station, via a radio frequency [*4] transmission, to the recipient pager where it can be read by the user of the recipient pager.

The City had no official policy directed to text-messaging by use of the pagers. However, the City did have a general "Computer Usage, Internet and E-mail Policy" (the "Policy") applicable to all employees. The Policy stated that "[t]he use of City-owned computers and all associated equipment, software, programs, networks, Internet, e-mail and other systems operating on these computers is limited to City of Ontario related business. The use of these tools for personal benefit is a significant violation of City of Ontario Policy." The Policy also provided:

> C. Access to all sites on the Internet is recorded and will be periodically reviewed by the City. The City of Ontario reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice. Users should have no expectation of privacy or confidentiality when using these resources.
>
> D. Access to the Internet and the e-mail system is **not** confidential; and information produced either in hard copy or in electronic form is considered City property. As such, these systems should not be used for personal [*5] or confidential communications. Deletion of e-mail or other electronic information may not fully delete the information from the system.
>
> E. The use of inappropriate, derogatory, obscene, suggestive, defamatory, or harassing language in the e-mail system will not be tolerated.

In 2000, before the City acquired the pagers, both Quon and Trujillo had signed an "Employee Acknowledgment," which borrowed language from the general Policy, indicating that they had "read and fully understand the City of Ontario's Computer Usage, Internet and E-mail policy." The Employee Acknowledgment, among other things, states that "[t]he City of Ontario reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice," and that "[u]sers should have no expectation of privacy or confidentiality when using these resources." Two years later, on April 18, 2002, Quon attended a meeting during which Lieutenant Steve Duke, a Commander with the Ontario Police Department's Administration Bureau, informed all present that the pager messages "were [*6] considered e-mail, and that those messages would fall under the City's policy as public information and eligible for auditing." Quon "vaguely recalled attending" this meeting, but did not recall Lieutenant Duke stating at the meeting that use of the pagers was governed by the City's Policy.

Although the City had no official policy expressly governing use of the pagers, the City did have an informal policy governing their use. Under the City's contract with Arch Wireless, each pager was allotted 25,000 characters, after which the City was required to pay overage charges. Lieutenant Duke "was in charge of the purchasing contract" and responsible for procuring payment for overages. He stated that "[t]he practice was, if there was overage, that the employee would pay for the overage that the City had. . . . [W]e would usually call the employee and say, 'Hey, look, you're over X amount of characters. It comes out to X amount of dollars. Can you write me a check for your overage[?]' "

The informal policy governing use of the pagers came to light during the Internal Affairs investigation, which took place after Lieutenant Duke grew weary of his role as bill collector. In a July 2, 2003 memorandum [*7] entitled "Internal Affairs Investigation of Jeffery Quon," (the "McMahon Memorandum") OPD Sergeant Patrick McMahon wrote that upon interviewing Lieutenant Duke, he learned that early on

> Lieutenant Duke went to Sergeant Quon and told him the City issued two-way pagers were considered e-mail and could be audited. He told Sergeant Quon it was not his intent to audit employee's [sic] text messages to see if the overage is due to work related transmissions. He advised Sergeant Quon he could reimburse the City for the overage so he would not have to audit the transmission and see how many messages were non-work related. Lieutenant Duke told Sergeant Quon he is doing this because if anybody wished to challenge their overage, he could audit the text transmissions to verify how many were non-work related. Lieutenant Duke added the text messages were considered public records and could be audited at any time.

For the most part, Lieutenant Duke agreed with McMahon's characterization of what he said during his interview. Later, however, during his deposition, Lieutenant Duke recalled the interaction as follows:

> I think what I told Quon was that he had to pay for his overage, that I did not want to [*8] determine if the overage was personal or business unless they wanted me to, because if they said, "It's all business, I'm not paying for it," then I would do an audit to confirm that. And I didn't want to get into the bill collecting thing, so he needed to pay for his personal messages so we didn't--pay for the overage so we didn't do the audit. And he needed to cut down on his transmissions.

According to the McMahon Memorandum, Quon remembered the interaction differently. When asked "if he ever recalled a discussion with Lieutenant Duke that if his textpager went over, his messages would be audited . . . Sergeant Quon said, 'No. In fact he [Lieutenant Duke] said the other, if you don't want us to read it, pay the overage fee.' "

Quon went over the monthly character limit "three or four times" and paid the City for the overages. Each time, "Lieutenant Duke would come and tell [him] that [he] owed X amount of dollars because [he] went over [his] allotted characters." Each of those times, Quon paid the City for the overages.

In August 2002, Quon and another officer again exceeded the 25,000 character limit. Lieutenant Duke then let it be known at a meeting that he was "tired of being a [*9] bill collector with guys going over the allotted amount of characters on their text pagers." In response, Chief Scharf ordered Lieutenant Duke to "request the transcripts of those pagers for auditing purposes." Chief Scharf asked Lieutenant Duke "to determine if the messages were exclusively work related, thereby requiring an increase in the number of characters officers were permitted, which had occurred in the past, or if they were using the pagers for personal matters. One of the officers whose transcripts [he] requested was plaintiff Jeff Quon."

City officials were not able to access the text messages themselves. Instead, the City e-mailed Jackie Deavers, a major account support specialist for Arch Wireless, requesting the transcripts. According to Deavers,

> I checked the phone numbers on the transcripts against the e-mail that I had gotten, and I looked into the system to make sure they were actually pagers that belonged to the City of Ontario, and they were. So I took the transcripts and put them in a manila envelope [and brought them to the City].

Deavers stated that she did not determine whether private messages were being released, though she acknowledged that, upon reviewing [*10] approximately four lines of the transcript, she had realized that the messages were sexually explicit. She also stated that she would only deliver messages to the "contact" on the account, and that she would not deliver messages to the "user" unless he was also the contact on the account. In this case, the "contact" was the City.

After receiving the transcripts, Lieutenant Duke conducted an initial audit and reported the results to Chief Scharf. Subsequently, Chief Scharf and Quon's supervisor, Lieutenant Tony Del Rio, reviewed the transcripts themselves. Then, in October 2002, Chief Scharf referred the matter to internal affairs "to determine if someone was wasting . . . City time not doing work when they should be." Sergeant McMahon, who conducted this investigation on behalf of Internal Affairs, enlisted the

help of Sergeant Glenn, also a member of Internal Affairs. Sergeant McMahon released the McMahon Memorandum on July 2, 2003. According to the Memorandum, the transcripts revealed that Quon "had exceeded his monthly allotted characters by 15,158 characters," and that many of these messages were personal in nature and were often sexually explicit. These messages were directed to [*11] and received from, among others, the other Appellants.

II. PROCEDURAL BACKGROUND

On May 6, 2003, Appellants filed a Second Amended Complaint in the District Court for the Central District of California alleging, *inter alia*, violations of the Stored Communications Act ("SCA") and the *Fourth Amendment*. After the district court dismissed one of Appellants' claims against Arch Wireless pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, all parties filed numerous rounds of summary judgment motions. On August 15, 2006, the district court denied Appellants' summary judgment motion in full, and granted in part and denied in part Appellees' summary judgment motions.

Appellants appeal the district court's holding that Arch Wireless did not violate the SCA, *18 U.S.C. §§ 2701-2711*. [2] The district court found that Arch Wireless was a "remote computing service" under *§ 2702(a)*, and that it therefore committed no harm when it released the text-message transcripts to its "subscriber," the City.

> 2 Appellants fail to raise on appeal their claims against Arch Wireless for violations of *California Penal Code section 629.86* and their state-law invasion of privacy claim under *Article I, Section 1 of the California Constitution*. [*12] Therefore, they have waived those claims. *See Blanford v. Sacramento County, 406 F.3d 1110, 1114 n.8 (9th Cir. 2005)*.

Appellants also appeal the district court's resolution of their claims against the City, the Department, Scharf, and Glenn. [3] Appellants argue that the City, the Department, and Scharf violated Appellants' *Fourth Amendment* rights to be free from unreasonable search and seizure pursuant to *42 U.S.C. § 1983*, and that the City, Department, Scharf, and Glenn violated *Article I, Section 1 of the California Constitution*, which protects a citizen's right to privacy. [4] The district court addressed only the *Fourth Amendment* claim. [5] Relying on *O'Connor v. Ortega, 480 U.S. 709, 715, 725-26, 107 S. Ct. 1492, 94 L. Ed. 2d 714 (1987)*, the district court determined that to prove a *Fourth Amendment* violation, the plaintiff must show that he had a reasonable expectation of privacy in his text messages, and that the government's search or seizure was unreasonable under the circumstances. The district court held that, in light of Lieutenant Duke's informal policy that he would not audit a pager if the user paid the overage charges, Appellants had a reasonable expectation of privacy in their text messages as a matter of [*13] law. Regarding the reasonableness of the search, the district court found that whether Chief Scharf's intent was to uncover misconduct or to determine the efficacy of the 25,000 character limit was a genuine issue of material fact. If it was the former, the search was unreasonable; if it was the latter, the search was reasonable. Concluding that Chief Scharf was not entitled to qualified immunity on the *Fourth Amendment* claim, and that the City and the Department were not entitled to statutory immunity on the California constitutional privacy claim, the district court held a jury trial on the single issue of Chief Scharf's intent. The jury found that Chief Scharf's intent was to determine the efficacy of the character limit. Therefore, all defendants were absolved of liability for the search.

> 3 Appellants fail to raise on appeal their claims against the City, the Department, Scharf, and Glenn for violations of the Stored Communications Act and *California Penal Code section 629.86*. Jerilyn Quon fails to address on appeal her claim for defamation and interference with prospective business advantage; nor does Florio address her claim that seizure of her personal pager and cell phone violated [*14] the *Fourth Amendment*. Therefore, Appellants have waived those claims. *See Blanford, 406 F.3d at 1114*.
>
> 4 "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." *CAL. CONST. art. I, § 1*.
>
> 5 The district court limited its discussion to the *Fourth Amendment* because "the arguments lodged by the governmental defendants against plaintiffs' invasion of privacy claim and state constitutional claim are the same as those pressed against plaintiffs' *Fourth Amendment* claim . . . ."

On December 7, 2006, Appellants filed a motion to amend or alter the judgment pursuant to *Federal Rule of Civil Procedure 59(e)*, and a motion for new trial pursuant to *Rule 59(a)*. The district court denied each of these motions. Appellants timely appeal.

III. JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction pursuant to *28 U.S.C. §§ 1331* and *1343*. We have jurisdiction over final

judgments of the district courts pursuant to *28 U.S.C. § 1291*.

We review a district court's grant of summary judgment de novo. *Bagdadi v. Nazar, 84 F.3d 1194, 1197 (9th Cir. 1996)*. [*15] In reviewing the grant of summary judgment, we "must determine, viewing the evidence in the light most favorable to the nonmoving party, whether genuine issues of material fact exist and whether the district court correctly applied the relevant substantive law." *Id.*

IV. DISCUSSION

A. Stored Communications Act

Congress passed the Stored Communications Act in 1986 as part of the Electronic Communications Privacy Act. The SCA was enacted because the advent of the Internet presented a host of potential privacy breaches that the *Fourth Amendment* does not address. *See* Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It, 72 GEO. WASH. L. REV. 1208, 1209-13 (2004)*. Generally, the SCA prevents "providers" of communication services from divulging private communications to certain entities and/or individuals. *Id. at 1213*. Appellants challenge the district court's finding that Arch Wireless is a "remote computing service" ("RCS") as opposed to an "electronic communication service" ("ECS") under the *SCA, §§ 2701-2711*. The district court correctly concluded that if Arch Wireless is an ECS, it is liable as a matter of law, and that if it is an RCS, [*16] it is not liable. However, we disagree with the district court that Arch Wireless acted as an RCS for the City. Therefore, summary judgment in favor of Arch Wireless was error.

Section 2702 of the SCA governs liability for both ECS and RCS providers. *18 U.S.C. § 2702(a)(1)-(2)*. The nature of the services Arch Wireless offered to the City determines whether Arch Wireless is an ECS or an RCS. As the Niekamp Declaration makes clear, Arch Wireless provided to the City a service whereby it would facilitate communication between two pagers--"text messaging" over radio frequencies. As part of that service, Arch Wireless archived a copy of the message on its server. When Arch Wireless released to the City the transcripts of Appellants' messages, Arch Wireless potentially ran afoul of the SCA. This is because both an ECS and RCS can release private information to, or with the lawful consent of, "an addressee or intended recipient of such communication," *id. § 2702(b)(1), (b)(3)*, whereas only an RCS can release such information "with the lawful consent of . . . the subscriber." *Id. § 2702(b)(3)*. It is undisputed that the City was not an "addressee or intended recipient," and that the City was [*17] a "subscriber."

The SCA defines an ECS as "any service which provides to users thereof the ability to send or receive wire or electronic communications." *Id. § 2510(15)*. The SCA prohibits an ECS from "knowingly divulg[ing] to any person or entity the contents of a communication while in electronic storage by that service," unless, among other exceptions not relevant to this appeal, that person or entity is "an addressee or intended recipient of such communication." *Id. § 2702(a)(1), (b)(1), (b)(3)*. "Electronic storage" is defined as "(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication." *Id. § 2510(17)*.

An RCS is defined as "the provision to the public of computer storage or processing services by means of an electronic communications system." *Id. § 2711(2)*. Electronic communication system--which is simply the means by which an RCS provides computer storage or processing services and has no bearing on how we interpret the meaning of "RCS"--is defined as "any wire, radio, electromagnetic, [*18] photooptical or photoelectronic facilities for the transmission of wire or electronic communications, and any computer facilities or related electronic equipment for the electronic storage of such communications." *Id. § 2510(14)*. The SCA prohibits an RCS from "knowingly divulg[ing] to any person or entity the contents of any communication which is carried or maintained on that service." Unlike an ECS, an RCS may release the contents of a communication with the lawful consent of a "subscriber." *Id. § 2702(a)(2), (b)(3)*.

We turn to the plain language of the SCA, including its common-sense definitions, to properly categorize Arch Wireless. An ECS is defined as "any service which provides to users thereof the ability to send or receive wire or electronic communications." *18 U.S.C. § 2510(15)*. On its face, this describes the text-messaging pager services that Arch Wireless provided. Arch Wireless provided a "service" that enabled Quon and the other Appellants to "send or receive . . . electronic communications," i.e., text messages. Contrast that definition with that for an RCS, which "means the provision to the public of computer storage or processing services by means of an electronic [*19] communications system." *Id. § 2711(2)*. Arch Wireless did not provide to the City "computer storage"; nor did it provide "processing services." By archiving the text messages on its server, Arch Wireless certainly was "storing" the messages. However, Congress contemplated this exact function could be performed by an ECS as well, stating that an ECS would provide (A) temporary storage incidental to the communication; and (B) storage for backup protection. *Id. § 2510(17)*.

This reading of the SCA is supported by its legislative history. The Senate Report identifies two main services that providers performed in 1986: (1) data communication; and (2) data storage and processing. First, the report describes the means of communication of information:

> [W]e have large-scale electronic mail operations, computer-to-computer data transmissions, cellular and cordless telephones, paging devices, and video teleconferencing . . . . [M]any different companies, not just common carriers, offer a wide variety of telephone and other communications services.

S. REP. NO. 99-541, at 2-3 (1986). Second,

> [t]he Committee also recognizes that computers are used extensively today for the storage and processing of information. [*20] With the advent of computerized recordkeeping systems, Americans have lost the ability to lock away a great deal of personal and business information. For example, physicians and hospitals maintain medical files in offsite data banks, businesses of all sizes transmit their records to remote computers to obtain sophisticated data processing services. These services as well as the providers of electronic mail create electronic copies of private correspondence for later reference. This information is processed for the benefit of the user but often it is maintained for approximately 3 months to ensure system integrity.

Id. at 3. Under the heading "Remote Computer Services," the Report further clarifies that term refers to the processing or storage of data by an off-site third party:

> In the age of rapid computerization, a basic choice has faced the users of computer technology. That is, whether to process data inhouse on the user's own computer or on someone else's equipment. Over the years, remote computer service companies have developed to provide sophisticated and convenient computing services to subscribers and customers from remote facilities. Today businesses of all sizes--hospitals, [*21] banks and many others--use remote computing services for computer processing. This processing can be done with the customer or subscriber using the facilities of the remote computing service in essentially a time-sharing arrangement, or it can be accomplished by the service provider on the basis of information supplied by the subscriber or customer. Data is most often transmitted between these services and their customers by means of electronic communications.

Id. at 10-11.

In the Senate Report, Congress made clear what it meant by "storage and processing of information." It provided the following example of storage: "physicians and hospitals maintain medical files in offsite data banks." Congress appeared to view "storage" as a virtual filing cabinet, which is not the function Arch Wireless contracted to provide here. The Senate Report also provided an example of "processing of information": "businesses of all sizes transmit their records to remote computers to obtain sophisticated data processing services." In light of the Report's elaboration upon what Congress intended by the term "Remote Computer Services," it is clear that, before the advent of advanced computer processing programs [*22] such as Microsoft Excel, businesses had to farm out sophisticated processing to a service that would process the information. *See* Kerr, *72 GEO. WASH. L. REV. at 1213-14.* Neither of these examples describes the service that Arch Wireless provided to the City.

Any lingering doubt that Arch Wireless is an ECS that retained messages in electronic storage is disposed of by *Theofel v. Farey-Jones, 359 F.3d 1066, 1070 (9th Cir. 2004).* In *Theofel*, we held that a provider of e-mail services, undisputedly an ECS, stored e-mails on its servers for backup protection. *Id. at 1075.* NetGate was the plaintiffs' Internet Service Provider ("ISP"). Pursuant to a subpoena, NetGate turned over plaintiffs' e-mail messages to the defendants. We concluded that plaintiffs' e-mail messages--which were stored on NetGate's server after delivery to the recipient--were "stored 'for purposes of backup protection' . . . . within the ordinary meaning of those terms." *Id.* (citation omitted).

The service provided by NetGate is closely analogous to Arch Wireless's storage of Appellants' messages. Much like Arch Wireless, NetGate served as a conduit for the transmission of electronic communications from one user to another, [*23] and stored those communications "as a 'backup' for the user." *Id.* Although it is not clear for whom Arch Wireless "archived" the text messages--presumably for the user or Arch Wireless itself--it is clear that the messages were archived for "backup pro-

tection," just as they were in *Theofel*. Accordingly, Arch Wireless is more appropriately categorized as an ECS than an RCS.

Arch Wireless contends that our analysis in *Theofel* of the definition of "backup protection" supports its position. There, we noted that "[w]here the underlying message has expired in the normal course, any copy is no longer performing any backup function. An ISP that kept permanent copies of temporary messages could not fairly be described as 'backing up' those messages." *Id. at 1070*. Thus, the argument goes, Arch Wireless's permanent retention of the Appellants' text messages could not have been for backup purposes; instead, it must have been for storage purposes, which would require us to classify Arch Wireless as an RCS. This reading is not persuasive. First, there is no indication in the record that Arch Wireless retained a permanent copy of the text-messages or stored them for the benefit of the City; instead, [*24] the Niekamp Declaration simply states that copies of the messages are "archived" on Arch Wireless's server. More importantly, *Theofel's* holding--that the e-mail messages stored on NetGate's server after delivery were for "backup protection," and that NetGate was undisputedly an ECS--forecloses Arch Wireless's position.

We hold that Arch Wireless provided an "electronic communication service" to the City. The parties do not dispute that Arch Wireless acted "knowingly" when it released the transcripts to the City. When Arch Wireless knowingly turned over the text-messaging transcripts to the City, which was a "subscriber," not "an addressee or intended recipient of such communication," it violated the SCA, *18 U.S.C. § 2702(a)(1)*. Accordingly, judgment in Appellants' favor on their claims against Arch Wireless is appropriate as a matter of law, and we remand to the district court for proceedings consistent with this holding.

B. *Fourth Amendment*

Appellants assert that they are entitled to summary judgment on their *Fourth Amendment* claim against the City, the Department, and Scharf, and on their California constitutional privacy claim against the City, the Department, Scharf, and Glenn. Specifically, [*25] Appellants agree with the district court's conclusion that they had a reasonable expectation of privacy in the text messages. However, they argue that the issue regarding Chief Scharf's intent in authorizing the search never should have gone to trial because the search was unreasonable as a matter of law. We agree.

"The 'privacy' protected by [*Article I, Section 1 of the California Constitution*] is no broader in the area of search and seizure than the 'privacy' protected by the *Fourth Amendment* . . . ." *Hill v. Nat'l Collegiate Ath. Ass'n, 7 Cal. 4th 1, 30 n.9, 26 Cal. Rptr. 2d 834, 865 P.2d 633 (1994)*. Accordingly, our analysis proceeds under the *Fourth Amendment to the United States Constitution*. The *Fourth Amendment* protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." *U.S. CONST. amend. IV*. "[T]he touchstone of the *Fourth Amendment* is reasonableness." *United States v. Kriesel, 508 F.3d 941, 947 (9th Cir. 2007)* (citing *Samson v. California, 547 U.S. 843, 126 S. Ct. 2193, 2201 n.4, 165 L. Ed. 2d 250 (2006)*). Under the "general *Fourth Amendment* approach," we examine "the totality of the circumstances to determine whether a search is reasonable." *Id.* "The reasonableness [*26] of a search is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *United States v. Knights, 534 U.S. 112, 118-19, 122 S. Ct. 587, 151 L. Ed. 2d 497 (2001)* (internal quotation marks omitted).

"Searches and seizures by government employers or supervisors of the private property of their employees . . . are subject to the restraints of the *Fourth Amendment*." *O'Connor, 480 U.S. at 715*. In *O'Connor*, the Supreme Court reasoned that "[i]ndividuals do not lose *Fourth Amendment* rights merely because they work for the government instead of a private employer." *Id. at 717*. However, the Court also noted that "[t]he operational realities of the workplace . . . may make *some* employees' expectations of privacy unreasonable." *Id.* For example, "[p]ublic employees' expectations of privacy in their offices, desks, and file cabinets . . . may be reduced by virtue of actual office practices and procedures, or by legitimate regulation." *Id.* The Court recognized that, "[g]iven the great variety of work environments in the public sector, the question whether an employee has a reasonable [*27] expectation of privacy must be addressed on a case-by-case basis." *Id. at 718*.

Even assuming an employee has a reasonable expectation of privacy in the item seized or the area searched, he must also demonstrate that the search was unreasonable to prove a *Fourth Amendment* violation: "public employer intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances." *Id. at 725-26*. Under this standard, we must evaluate whether the search was "justified at its inception," and whether it "was reasonably related in scope to the circumstances which justified the interference in the first place." *Id. at 726* (internal quotation marks omitted).

1. Reasonable Expectation of Privacy

The extent to which the *Fourth Amendment* provides protection for the contents of electronic communications in the Internet age is an open question. The recently minted standard of electronic communication via e-mails, text messages, and other means opens a new frontier in *Fourth Amendment* jurisprudence that has been little [*28] explored. Here, we must first answer the threshold question: Do users of text messaging services such as those provided by Arch Wireless have a reasonable expectation of privacy in their text messages stored on the service provider's network? We hold that they do.

In *Katz v. United States, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)*, the government placed an electronic listening device on a public telephone booth, which allowed the government to listen to the telephone user's conversation. *Id. at 348*. The Supreme Court held that listening to the conversation through the electronic device violated the user's reasonable expectation of privacy. *Id. at 353*. In so holding, the Court reasoned, "One who occupies [a phone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication." *Id. at 352*. Therefore, "[t]he Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably [*29] relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the *Fourth Amendment*." *Id. at 353*.

On the other hand, the Court has also held that the government's use of a pen register--a device that records the phone numbers one dials--does not violate the *Fourth Amendment*. This is because people "realize that they must 'convey' phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed." *Smith v. Maryland, 442 U.S. 735, 742, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979)*. The Court distinguished *Katz* by noting that "a pen register differs significantly from the listening device employed in *Katz*, for pen registers do not acquire the *contents* of communications." *Id. at 741*.

This distinction also applies to written communications, such as letters. It is well-settled that, "since 1878, . . . the *Fourth Amendment's* protection against 'unreasonable searches and seizures' protects a citizen against the warrantless opening of sealed letters and packages addressed to him in order to examine the contents." *United States v. Choate, 576 F.2d 165, 174 (9th Cir. 1978)* (citing *Ex parte Jackson, 96 U.S. 727, 24 L. Ed. 877 (1877))*; *see also United States v. Jacobsen, 466 U.S. 109, 114, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984)* [*30] ("Letters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy."). However, as with the phone numbers they dial, individuals do not enjoy a reasonable expectation of privacy in what they write on the outside of an envelope. *See United States v. Hernandez, 313 F.3d 1206, 1209-10 (9th Cir. 2002)* ("Although a person has a legitimate interest that a mailed package will not be opened and searched en route, there can be no reasonable expectation that postal service employees will not handle the package or that they will not view its exterior" (citations omitted)).

Our Internet jurisprudence is instructive. In *United States v. Forrester*, we held that "e-mail . . . users have no expectation of privacy in the to/from addresses of their messages . . . because they should know that this information is provided to and used by Internet service providers for the specific purpose of directing the routing of information." *United States v. Forrester, 512 F.3d 500, 510 (9th Cir. 2008)*. Thus, we have extended the pen register and outside-of-envelope rationales to the "to/from" line of e-mails. But we have not ruled on whether [*31] persons have a reasonable expectation of privacy in the content of e-mails. Like the Supreme Court in *Smith*, in *Forrester* we explicitly noted that "e-mail to/from addresses . . . constitute addressing information and do not necessarily reveal any more about the underlying contents of communication than do phone numbers." *Id.* Thus, we concluded that "[t]he privacy interests in these two forms of communication [letters and e-mails] are identical," and that, while "[t]he contents may deserve *Fourth Amendment* protection . . . the address and size of the package do not." *Id. at 511*.

We see no meaningful difference between the e-mails at issue in *Forrester* and the text messages at issue here. [6] Both are sent from user to user via a service provider that stores the messages on its servers. Similarly, as in *Forrester*, we also see no meaningful distinction between text messages and letters. As with letters and e-mails, it is not reasonable to expect privacy in the information used to "address" a text message, such as the dialing of a phone number to send a message. However, users do have a reasonable expectation of privacy in the content of their text messages vis-a-vis the service provider. [*32] *Cf. United States v. Finley, 477 F.3d 250, 259 (5th Cir. 2007)* (holding that defendant had a reasonable expectation of privacy in the text messages on his cell phone, and that he consequently had standing to challenge the search). That Arch Wireless may have been able to access the contents of the messages for its own purposes is irrelevant. *See United States v. Heckenkamp, 482 F.3d 1142, 1146-47 (9th Cir. 2007)* (holding that a student did not lose his reasonable expectation of privacy in information stored on his computer, despite a univer-

sity policy that it could access his computer in limited circumstances while connected to the university's network); *United States v. Ziegler, 474 F.3d 1184, 1189-90 (9th Cir. 2007)* (holding that an employee had a reasonable expectation of privacy in a computer in a locked office despite a company policy that computer usage would be monitored). For, just as in *Heckencamp*, where we found persuasive that there was "no policy allowing the university actively to monitor or audit [the student's] computer usage," *482 F.3d at 1147*, Appellants did not expect that Arch Wireless would monitor their text messages, much less turn over the messages to third parties [*33] without Appellants' consent.

> 6 Because Jeff Quon's reasonable expectation of privacy hinges on the OPD's informal policy regarding his use of the OPD-issued pagers, *see infra* pages 7027-29, this conclusion affects only the rights of Trujillo, Florio, and Jerilyn Quon.

We do not endorse a monolithic view of text message users' reasonable expectation of privacy, as this is necessarily a context-sensitive inquiry. Absent an agreement to the contrary, Trujillo, Florio, and Jerilyn Quon had no reasonable expectation that Jeff Quon would maintain the private nature of their text messages, or vice versa. *See United States v. Maxwell, 45 M.J. 406, 418 (C.A.A.F. 1996)* ("[T]he maker of a telephone call has a reasonable expectation that police officials will not intercept and listen to the conversation; however, the conversation itself is held with the risk that one of the participants may reveal what is said to others." (citing *Hoffa v. United States, 385 U.S. 293, 302, 87 S. Ct. 408, 17 L. Ed. 2d 374 (1966)*)). Had Jeff Quon voluntarily permitted the Department to review his text messages, the remaining Appellants would have no claims. Nevertheless, the OPD surreptitiously reviewed messages that all parties reasonably believed [*34] were free from third-party review. As a matter of law, Trujillo, Florio, and Jerilyn Quon had a reasonable expectation that the Department would not review their messages absent consent from either a sender or recipient of the text messages.

We now turn to Jeff Quon's reasonable expectation of privacy, which turns on the Department's policies regarding privacy in his text messages. We agree with the district court that the Department's informal policy that the text messages would not be audited if he paid the overages rendered Quon's expectation of privacy in those messages reasonable.

The Department's general "Computer Usage, Internet and E-mail Policy" stated both that the use of computers "for personal benefit is a significant violation of City of Ontario Policy" and that "[u]sers should have no expectation of privacy or confidentiality when using these resources." Quon signed this Policy and attended a meeting in which it was made clear that the Policy also applied to use of the pagers. If that were all, this case would be analogous to the cases relied upon by the Appellees. *See, e.g., Muick v. Glenayre Elecs., 280 F.3d 741, 743 (7th Cir. 2002)* ("[Employer] had announced that it [*35] could inspect the laptops that it furnished for the use of its employees, and this destroyed any reasonable expectation of privacy that [employee] might have had and so scotches his claim."); *Bohach v. City of Reno, 932 F. Supp. 1232, 1234-35 (D. Nev. 1996)* (finding a diminished expectation of privacy under the *Fourth Amendment* where police department had issued a memorandum informing employees that messages sent on city-issued pagers would be "logged on the [department's] network" and that certain types of messages were "banned from the system," and because any employee "with access to, and a working knowledge of, the Department's computer system" could see the messages); *see also O'Connor, 480 U.S. at 719* (noting that expectation of privacy would not be reasonable if the employer "had established any reasonable regulation or policy discouraging employees . . . from storing personal papers and effects in their desks or file cabinets"); *Schowengerdt v. General Dynamics Corp., 823 F.2d 1328, 1335 (9th Cir. 1987)* ("We conclude that [the employee] would enjoy a reasonable expectation of privacy in areas given over to his exclusive use, unless he was on notice from his employer that searches [*36] of the type to which he was subjected might occur from time to time for work-related purposes.").

As the district court made clear, however, such was not the "operational reality" at the Department. The district court reasoned:

> Lieutenant Duke made it clear to the staff, and to Quon in particular, that he would *not* audit their pagers so long as they agreed to pay for any overages. Given that Lieutenant Duke was the one in charge of administering the use of the city-owned pagers, his statements carry a great deal of weight. Indeed, before the events that transpired in this case the department did not audit any employee's use of the pager for the eight months the pagers had been in use.

Even more telling, Quon had exceeded the 25,000 character limit "three or four times," and had paid for the overages every time without anyone reviewing the text of the messages. This demonstrated that the OPD followed its "informal policy" and that Quon reasonably relied on it. Nevertheless, without warning, his text messages were audited by the Department. Under these cir-

cumstances, Quon had a reasonable expectation of privacy in the text messages archived on Arch Wireless's server.

Appellees argue that, [*37] because Lieutenant Duke was not a policymaker, his informal policy could not create an objectively reasonable expectation of privacy. Moreover, Lieutenant Duke's statements "were specific to his own bill-collecting practices" and were "limited to . . . an accounting audit. He did not address privacy rights." However, as the district court pointed out, "Lieutenant Duke was the one in charge of administering the use of the city-owned pagers, [and] his statements carry a great deal of weight." That Lieutenant Duke was not the official policymaker, or even the final policymaker, does not diminish the chain of command. He was in charge of the pagers, and it was reasonable for Quon to rely on the policy--formal or informal--that Lieutenant Duke established and enforced.

Appellees also point to the California Public Records Act ("CPRA") to argue that Quon had no reasonable expectation of privacy because, under that Act, "public records are open to inspection at all times . . . and every person has a right to inspect any public record." *CAL GOV'T CODE § 6253.* Assuming for purposes of this appeal that the text messages archived on Arch Wireless's server were public records as defined by the [*38] CPRA, [7] we are not persuaded by Appellees' argument. The CPRA does not diminish an employee's reasonable expectation of privacy. As the district court reasoned, "There is no evidence before the [c]ourt suggesting that CPRA requests to the department are so widespread or frequent as to constitute 'an open atmosphere so open to fellow employees or the public that no expectation of privacy is reasonable.' " (quoting *Leventhal v. Knapek, 266 F.3d 64, 74 (2d Cir. 2001)* (internal quotation marks omitted)).

> 7 The Act defines "public records" as "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." *CAL GOV'T CODE § 6252(e).*

The *Fourth Amendment* utilizes a reasonableness standard. Although the fact that a hypothetical member of the public may request Quon's text messages might slightly diminish his expectation of privacy in the messages, it does not make his belief in the privacy of the text messages objectively unreasonable. *See Zaffuto v. City of Hammond, 308 F.3d 485, 489 (5th Cir. 2002)* ("[Defendant] also argues that the existence of Louisiana's public [*39] records law and a department policy that calls would be taped suggests that it would not be objectively reasonable for [plaintiff] to expect privacy in making a personal phone call from work . . . . [The officers testified that] they understood the policy to mean that only calls coming into the communications room (where outside citizens would call) were being recorded, not calls from private offices. A reasonable juror could conclude, on this evidence, that [plaintiff] expected that his call to his wife would be private, and that that expectation was objectively reasonable."). Therefore, Appellees' CPRA argument is without merit.

2. Reasonableness of the Search

Given that Appellants had a reasonable expectation of privacy in their text messages, we now consider whether the search was reasonable. We hold that it was not.

The district court found a material dispute concerning the "actual *purpose* or *objective* Chief Scharf sought to achieve in having Lieutenant Duke perform the audit of Quon's pager." It reasoned that if Chief Scharf's purpose was to uncover misconduct, the search was unreasonable at its inception because "the officers' pagers were audited for the period when Lieutenant [*40] Duke's informal, but express policy of *not* auditing pagers unless overages went unpaid was in effect." The district court further reasoned, however, that if the purpose was to determine "the utility or efficacy of the existing monthly character limits," the search was reasonable because "the audit was done for the benefit of (not as a punishment against) the officers who had gone over the monthly character limits." Concluding that a genuine issue of material fact existed on this point, the district judge determined that this was a question for the jury. The jury found that Chief Scharf's purpose was to "determine the efficacy of the existing character limits to ensure that officers were not being required to pay for work-related expenses," rendering a verdict in favor of the City, the Department, Scharf, and Glenn.

Given that a jury has already found that Chief Scharf's purpose in auditing the text messages was to determine the efficacy of the 25,000 character limit, we must determine--keeping that purpose in mind--whether the search was nevertheless unconstitutional.

A search is reasonable "at its inception" if there are "reasonable grounds for suspecting . . . that the search is necessary [*41] for a noninvestigatory work-related purpose such as to retrieve a needed file." *O'Connor, 480 U.S. at 726.* Here, the purpose was to ensure that officers were not being required to pay for work-related expenses. This is a legitimate workrelated rationale, as the district court acknowledged.

However, the search was not reasonable in scope. As *O'Connor* makes clear, a search is reasonable in scope "when the measures adopted are reasonably related to the

objectives of the search and not excessively intrusive in light of . . . the nature of the [misconduct]." *Id.* (internal quotation marks omitted). Thus, "if less intrusive methods were feasible, or if the depth of the inquiry or extent of the seizure exceeded that necessary for the government's legitimate purposes . . . the search would be unreasonable . . . ." *Schowengerdt, 823 F.2d at 1336.* The district court determined that there were no lessintrusive means, reasoning that talking to the officers beforehand or looking only at the numbers dialed would not have allowed Chief Scharf to determine whether 25,000 characters were sufficient for work-related text messaging because that required examining the content of all the messages. Therefore, [*42] "the only way to accurately and definitively determine whether such hidden costs were being imposed by the monthly character limits that were in place was by looking at the actual text-messages used by the officers who exceeded the character limits."

We disagree. There were a host of simple ways to verify the efficacy of the 25,000 character limit (if that, indeed, was the intended purpose) without intruding on Appellants' *Fourth Amendment* rights. For example, the Department could have warned Quon that for the month of September he was forbidden from using his pager for personal communications, and that the contents of all of his messages would be reviewed to ensure the pager was used only for work-related purposes during that time frame. Alternatively, if the Department wanted to review past usage, it could have asked Quon to count the characters himself, or asked him to redact personal messages and grant permission to the Department to review the redacted transcript. Under this process, Quon would have an incentive to be truthful because he may have previously paid for work-related overages and presumably would want the limit increased to avoid paying for such overages in the future. [*43] These are just a few of the ways in which the Department could have conducted a search that was reasonable in scope. Instead, the Department opted to review the contents of all the messages, work-related and personal, without the consent of Quon or the remaining Appellants. This was excessively intrusive in light of the noninvestigatory object of the search, and because Appellants had a reasonable expectation of privacy in those messages, the search violated their *Fourth Amendment* rights.

3. Qualified Immunity for Chief Scharf

Chief Scharf asserts that, even if we conclude that he violated Appellants' *Fourth Amendment* and California constitutional privacy rights, he is entitled to qualified immunity. We agree.

When determining whether qualified immunity applies, we engage in the following two-step inquiry. First, we ask, "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier v. Katz, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001).* If we answer this question in the affirmative, as we do here, we then proceed to determine "whether the right was clearly established." *Id.* "This inquiry . . . must be undertaken [*44] in light of the specific context of the case, not as a broad general proposition." *Id.* Specifically, "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id. at 202.*

Chief Scharf argues that, "[i]n 2002, there was no clearly established law from the Supreme Court or our Circuit governing the right of a government employer to review text messages on government-issued pagers in order to determine whether employees are engaging in excessive personal use of the pagers while on duty." Chief Scharf misconstrues *Saucier.* While there may be no case with a holding that aligns perfectly with the factual scenario presented here, it was clear at the time of the search that an employee is free from unreasonable search and seizure in the workplace. *See, e.g., O'Connor, 480 U.S. at 715 (1987); Schowengerdt, 823 F.2d at 1335 (1987); Ortega v. O'Connor, 146 F.3d 1149, 1157 (9th Cir. 1998)* ("[I]t was clearly established in 1981 that, in the absence of an accepted practice or regulation to the contrary, government employees . . . had a reasonable expectation [*45] of privacy in their private offices, desks, and file cabinets, thereby triggering the protections of the *Fourth Amendment* with regard to searches and seizures.").

Nevertheless, we ultimately agree with Chief Scharf because, at the time of the search, there was no clearly established law regarding whether users of text-messages that are archived, however temporarily, by the service provider have a reasonable expectation of privacy in those messages. Therefore, Chief Scharf is entitled to qualified immunity.

4. Statutory Immunity on the California Constitutional Claim

The City and the Department contend that they are shielded from liability on the California constitutional claim. We conclude that the district court correctly determined that the City and the Department are not protected by statutory immunity.

California Government Code section 821.6 provides that "[a] public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause." "The policy behind *section 821.6* is to encourage fearless performance of official duties. State officers and [*46]

employees are encouraged to investigate and prosecute matters within their purview without fear of reprisal from the person or entity harmed thereby." *Shoemaker v. Myers, 2 Cal. App. 4th 1407, 1424, 4 Cal. Rptr. 2d 203 (1992)* (citations omitted). Immunity "also extends to actions taken in preparation for formal proceedings. Because investigation is an essential step toward the institution of formal proceedings, it is also cloaked with immunity." *Amylou R. v. County of Riverside, 28 Cal. App. 4th 1205, 1209-10, 34 Cal. Rptr. 2d 319 (1994)* (internal quotation marks omitted).

Although Chief Scharf ordered an "investigation" in the ordinary sense of the word, the investigation never could have led to a "judicial or administrative proceeding" because Lieutenant Duke's informal policy permitted officers to use the pagers for personal purposes and to exceed the 25,000 character limit. Thus, Quon could have committed no misconduct, a prerequisite for a formal proceeding against him. As such, the City's and Department's conduct does not fall within *California Government Code section 821.6*, and they are not entitled to statutory immunity.

V. CONCLUSION

As a matter of law, Arch Wireless is an "electronic communication service" that provided [*47] text messaging service via pagers to the Ontario Police Department. The search of Appellants' text messages violated their *Fourth Amendment* and California constitutional privacy rights because they had a reasonable expectation of privacy in the content of the text messages, and the search was unreasonable in scope. While Chief Scharf is shielded by qualified immunity, the City and the Department are not shielded by statutory immunity. In light of our conclusions of law, we affirm in part, reverse in part, and remand to the district court for further proceedings on Appellants' Stored Communications Act claim against Arch Wireless, and their claims against the City, the Department, and Glenn under the *Fourth Amendment* and California Constitution.

Because we hold that Appellants prevail as a matter of law on their claims against Arch Wireless, the City, the Department, and Glenn, we need not reach their appeal from the denial of their motions to alter or amend the judgment and for a new trial under *Federal Rule of Civil Procedure 59*. The parties shall bear their own costs of appeal.

AFFIRMED in part, REVERSED in part, and REMANDED for Further Proceedings.

HPeople v. Glenn
Mich.App.,2004.
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.
PEOPLE of the State of Michigan, Plaintiff-Appellee,
v.
Delisa Renice GLENN, Defendant-Appellant.
No. 237515.

April 1, 2004.

Before: MARKEY, P.J., and SAAD and WILDER, JJ.

[UNPUBLISHED]

PER CURIAM.

ON RECONSIDERATION

*1 Defendant appeals as of right her conviction following a bench trial on charges of possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v), and resisting or obstructing a police officer, MCL 750.479(b). We vacate and remand for a new trial.

Defendant first asserts that the trial court erred in admitting a laboratory report indicating a substance found in defendant's vagina was cocaine because the laboratory analyst did not testify at trial. Defendant contends the report constituted hearsay and that the trial court erred in admitting it under the business records exception to the hearsay rule, MRE 803(6). We agree.

A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v. Starr*, 457 Mich. 490, 494;577 NW2d 673 (1998). However, a trial court's construction of a rule of evidence is subject to de novo review. *People v. Washington*, 251 Mich.App 520, 524;650 NW2d 708 (2002).

In *People v. McDaniel*, 469 Mich. 409, 414;670 NW2d 659 (2003), the Michigan Supreme Court held that a police laboratory report is inadmissible hearsay under MRE 803(6) because its preparation in anticipation of litigation, the prosecution of a charged crime, causes " 'the source of the information or the method or circumstances of preparation [to] indicate lack of trustworthiness." ' *Id.*, quoting MRE 803(6). The Supreme Court also held that a police laboratory report is inadmissible hearsay under MRE 803(8), which permits the admission of routine police reports that are nonadversarial as to the defendant. Because the report in this case is intended to establish an element of a crime, it is adversarial to defendant and therefore inadmissible. *McDaniel, supra* at 413.As the Supreme Court concluded in *McDaniel*, we conclude here that the erroneous admission of the report "cannot be harmless because this was the only evidence that established an element of the crime for which defendant was charged." *Id.*

Next, defendant challenges the warrant authorizing police to conduct a body cavity search of defendant, asserting that the trial court erred in denying her motion to suppress all evidence obtained through the search. First, defendant contends that probable cause did not exist to justify the search. We disagree.

In reviewing a ruling on a motion to suppress seized evidence, we review the trial court's findings of fact for clear error but review the lower court's ultimate decision de novo. *People v. Sobczak-Obetts*, 463 Mich. 687, 694;625 NW2d 764 (2001). A search warrant must be supported by probable cause to justify the search. US Const, Amend IV; Const 1963, art 1, § 11; MCL 780.651; *People v. Kaslowski*, 239 Mich.App 320, 323;608 NW2d 539 (2000)." 'Probable cause sufficient to support issuing a search warrant exists when all the facts and circumstances would lead a reasonable person to believe that the evidence of a crime or the contraband sought is in the place requested to be searched." ' *People v. Ulman*, 244 Mich.App 500, 509;625 NW2d 429 (2001), quoting *People v. Brannon*, 194 Mich.App 121, 132;486 NW2d 83 (1992).

*2 On appeal, we must determine whether a reasonably cautions person could have concluded that, under the totality of the circumstances, probable cause existed to conclude the evidence sought might be found in a specific location. *People v. Echavarria*, 233 Mich.App 356, 367;592 NW2d 737 (1999). Further, we read the search warrant and the underlying affidavit in a realistic and common sense manner, and we give deference to the magistrate's determination. *People v. Whitfield*, 461 Mich. 441, 446;607 NW2d 61 (2000).

Defendant asserts that the police based their search solely on defendant's furtive gestures, namely defendant placing her hands inside her unfastened pants. Our Supreme Court has held that furtive gestures alone do not create probable cause to justify a search. *People v. Howell*, 394 Mich. 445, 447;231 NW2d 650 (1975). However, the record indicates other factors raised the officer's suspicion, including defendant's refusal to comply with the officer's orders to step out of the squad car, defendant's throwing a used tampon on the ground, and the officer's knowledge regarding the concealment of controlled substances. Viewing the factors as a whole, we conclude the officer had probable cause to perform a body cavity search on defendant.

Next, defendant argues in propia persona that the search warrant was invalid because the description "any and all controlled substances" did not describe with particularity the items to be searched for and seized. We disagree.

A search warrant must describe with particularity the items to be seized. US Const Am IV; Const 1963, art 1, § 11; MCL 780.654. A general search warrant does not pass constitutional muster because it leaves the search's scope to the officer's discretion. *People v. Toodle*, 155 Mich.App 539, 548;400 NW2d 670 (1986). However, "[t]he degree of specificity required depends on the circumstances and the types of items involved." *People v. Zuccarini*, 172 Mich.App 11, 15;431 NW2d 446 (1988).

The description "any and all controlled substances" described with sufficient particularity the items to be seized from defendant because the language provided a significant limit on what the executing officers could seize. For instance, the officers could not have seized weapons or cash. Thus, the warrant was not overly broad.

Next, defendant also argues in propia persona that the search warrant was invalid because the judge issued it via facsimile. Defendant asserts that faxed search warrants may be used only to obtain blood-alcohol tests in drunken driving cases, but she cites irrelevant authority. MCL 780.651(2) and (3) allow application for and issuance of search warrants through electronic or electromagnetic means, including facsimile, without limitation to the crime involved. Therefore, defendant's argument is without merit.

Defendant next contends in propia persona that the search warrant was invalid because it did not appear on a form approved by the State Court Administrator's Office, was not printed on the proper paper, and did not bear a court seal. Defendant points to no authority to support her claim that a warrant must appear on a SCAO-approved form. Moreover, the form of the warrant at issue closely mirrors the SCAO-approved form for search warrants, and defendant failed to explain how the warrant at issue is deficient or what prejudice resulted from any departures from the SCAO-approved form.

*3 Defendant also contends in propia persona that the warrant violates MCL 780.651 by allegedly failing to comply with paper quality and other standards established by the state court administrator. Because defendant fails to identify with specificity the standards with which the warrant is alleged to be noncompliant, we consider this issue abandoned.

Additionally, defendant claims in propia persona that the trial court improperly relied upon a controlled substance offense as part of the basis of her conviction as an habitual offender. We disagree. The information does not list a controlled substance offense among defendant's prior convictions, and the trial court stated at sentencing that the two prior felony convictions specified on the information were a forgery and uttering and publishing conviction in 1999, and a retail fraud conviction in 1992. Therefore, defendant's argument is without merit.

Finally, defendant asserts in propia persona that she was denied due process because she was not informed that she had been charged as an habitual offender. The record, however, establishes that the information contains a third offense notice advising

defendant that she was subject to enhanced penalties upon conviction pursuant to MCL 769.11. Accordingly, we find that defendant's claim lacks merit.

In light of our resolution of the foregoing issues, we find it unnecessary to address defendant's remaining in propia persona assertion that when the trial court rendered its decision in this case, it did so without being aware of all the applicable law.

Defendant's conviction is vacated, and we remand for new trial. We do not retain jurisdiction.

Mich.App.,2004.
People v. Glenn
Not Reported in N.W.2d, 2004 WL 691689 (Mich.App.)

END OF DOCUMENT

CMesser v. Rohrer
S.D.Ohio,1997.
Only the Westlaw citation is currently available.
United States District Court, S.D. Ohio, Western Division.
James MESSER, et al., Plaintiffs,
v.
Mark A. ROHRER, et al., Defendants.
No. C-3-95-270.

March 31, 1997.

Richard B Relling, Birt, Walsh, Simmons, Ensley & Reiling, Dayton, for James Nmi Messer, Karen Messer, Curtis Lee Messer, minor child, Jamie Lynn Messer, minor child, Randy Messer, plaintiffs.
Robin B DeBell, City of Springfield-3, Law Department, Springfield, Carol Anne Hamilton O'Brien, Ohio Attorney General-2, Corrections Litigation, Columbus, for Mark A Rohrer, Detective, Springfield Police Department, City of, Springfield City of, Jimmie Hawke, Agent, Ohio Bureau of Criminal Identification and Investigation, Gregory Nourse, Officer, Springfield Police Department, defendants.

DECISION AND ENTRY SUSTAINING MOTION OF DEFENDANTS MARK A. ROHRER, CITY OF SPRINGFIELD POLICE DEPARTMENT AND CITY OF SPRINGFIELD TO EXCLUDE EXPERT WITNESSES FROM TESTIFYING (DOC. # 21); DECISION AND ENTRY SUSTAINING MOTION OF AFORESAID DEFENDANTS TO STRIKE IDENTIFIED PORTIONS OF AFFIDAVIT OF KAREN MESSER (DOC. # 25); DECISION AND ENTRY CONDITIONALLY SUSTAINING MOTION OF AFORESAID DEFENDANTS FOR SUMMARY JUDGMENT (DOC. # 22); DEFENDANTS' COUNSEL DIRECTED TO FILE, WITHIN TEN (10) DAYS OF THE DATE OF THIS DECISION, CERTIFICATION PAGE OF KAREN MESSER DEPOSITION; PLAINTIFFS ORDERED TO SHOW CAUSE, WITHIN TEN (10) DAYS OF THE DATE OF THIS DECISION, WHY SPECIFIED DEFENDANTS SHOULD NOT BE DISMISSED

RICE, Chief J.

*1 This case arises from circumstances surrounding the application for and execution of a search warrant at the Plaintiffs' residence, located at 2101 Hoppes Avenue, in Springfield, Ohio. Plaintiffs James Messer, Karen Messer, Curtis Lee Messer, Jamie Lynn Messer, and Randy Messer,[FN1] sue various Defendants, including Detective Mark A. Rohrer, Defendant City of Springfield ("City"), and Defendant City of Springfield Police Department ("Police Department"), upon the following claims, alleged in their First Amended Complaint (Doc. # 18): against Defendant Rohrer and other individual Defendants, violation of 42 U.S.C. § 1983 and unspecified constitutional rights, by executing the search warrant in an unreasonable manner (*Count One*); against Defendant Rohrer and other individual Defendants, violation of 42 U.S.C. § 1983 and unspecified constitutional rights, by performing an illegal search that was based upon a search warrant lacking in probable cause (*Count Two*); against Defendant City, violation of 42 U.S.C. § 1983, by failing to train its officers in the proper methods for obtaining search warrants (*Count Three*); against Defendant Rohrer and other individual Defendants, violation of the right to be free from unreasonable searches and seizures, as guaranteed by the Fourth Amendment to the United States Constitution (*Count Four*); [FN2] against all Defendants, state-law claims of negligent and intentional infliction of emotional distress (*Count Five*); against all Defendants, violation of the Plaintiffs' right to procedural due process, in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, *and* violation of the Plaintiffs' right to just compensation for private property taken for public use, in violation of the Takings Clause of the Fifth Amendment to the United States Constitution (*Count Six*); against all Defendants, a state-law claim of invasion of privacy (*Count Seven*); against all Defendants, a state-law claim of trespass (*Count Eight*); against all Defendants, a state-law claim of assault (*Count Nine*); against all Defendants, a state-law claim of defamation (*Count Ten*); against all Defendants, a state-law claim of false imprisonment (*Count Eleven*); [FN3] and against Defendant Mark Rohrer and other individual Defendants, a state-law claim of malicious prosecution (*Count Twelve*).

FN1. James and Karen Messer are the parents of minor children Curtis Lee and Jamie Lynn, who bring this suit by and through their parents. Randy Messer is James' brother.

FN2. This Count is, essentially, identical to the claims set forth in Counts One and Two.

FN3. Although this Count is also labeled as "Count Ten" in the Plaintiffs' First Amended Complaint, the Court will renumber this claim as Count Eleven (and, therefore, will renumber "Count Eleven" as Count Twelve), for purposes of clarity.

This Court has federal question jurisdiction, pursuant to 28 U.S.C. § 1331, over Counts One, Two, Three, Four and Six. The Court may properly exercise its supplemental jurisdiction over the Plaintiffs' state-law claims (Counts Five, Seven, Eight, Nine, Ten, Eleven and Twelve), pursuant to 28 U.S.C. § 1367, as these claims are so related to the federal claims that they form part of the same case or controversy under Article III of the United States Constitution.

Currently pending before the Court are the following Motions: Motion of Defendants Mark Rohrer, City of Springfield Police Department and City of Springfield to Exclude Expert Witnesses from Testifying (Doc. # 21); Motion of aforesaid Defendants to Strike Identified Portions of Affidavit of Karen Messer, attached to Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment (Doc. # 25); and Motion of aforesaid Defendants for Summary Judgment (Doc. # 22). The Court will address each of these Motions in turn.

I. *Defendants' Motion to Exclude Expert Witnesses from Testifying (Doc. # 21)*

*2 This Motion, which is unopposed, seeks to exclude the testimony of Dr. Isaac Myers and Dr. Tajuddin Ahmed, based upon the Plaintiffs' failure to disclose the identity of these witnesses within the timetable set forth by this Court (Doc. # 6). Specifically, whereas the identities of these witnesses were to be disclosed by the Plaintiffs by December 6, 1995, they were not revealed until May 9, 1996 (Doc. # 20).

The Court finds that this unopposed Motion is well-taken, for the reasons set forth therein by the Defendants. In any event, the need for this testimony is greatly lessened, if not altogether eliminated, by the Court's decision herein. Accordingly, the Defendants' Motion to Exclude Expert Witnesses from Testifying (Doc. # 21) is SUSTAINED.

II. *Defendants' Motion to Strike Identified Portions of Messer Affidavit (Doc. # 25)*

In this Motion, which is also unopposed, Defendants seek to strike the following portions of the Affidavit of Karen Messer (attached to Doc. # 23, Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment):

[¶ 5] This Affiant further states that she has learned from John Cook, Supervisor of Customer Service for Ohio Edison, that he has on numerous occasions informed the Springfield police department not to use bill comparisons for growing operations and that the only way to make such a determination is to go into the residences.

[¶ 9] This Affiant further states that she has learned from Dr. Robert McMann, Professor of Horticulture at The Ohio State University, that there is no such thing as grow cycles for marijuana and that the reliance by the law enforcement officials on such language is misleading.

[¶ 10] This Affiant further states that she has learned from BFG Supplies that the type of lights used for growing operations produce so much heat that they cannot be used in an upstairs location for growing operations without proper ventilation which would have been detectable from the outside of the residence without the need for enhanced vision.

[¶ 11] This Affiant further states that she has learned from BFG Supplies that the type of lights used for growing operations require so much energy that [her] electrical bill is not consistent with a grow operation.

Messer Affidavit at ¶¶ 5, 9, 10, 11. Defendants argue that these statements should be stricken for lack of personal knowledge and as inadmissible hearsay evidence. The Court agrees that the statements lack

personal knowledge and a foundation, as required by Fed.R.Evid. 602, and are also inadmissible hearsay, insofar as they are offered to prove the truth of the matter asserted. Therefore, the Court will sustain the Defendants' objections, and disregard these paragraphs in their entirety.

Defendants also request that the Court disregard a newspaper article attached to the Affidavit, specifically objecting to statements set forth therein by now-retired Montgomery County Common Pleas Court Judge Richard S. Dodge, relative to the existence of probable cause to issue a search warrant. Defendants argue that these statements should be disregarded because they are unsworn, hearsay, and improper expert testimony due to the Plaintiffs' failure to identify Dodge as an expert witness. The Court agrees that Dodge's statements should be disregarded because they are unsworn and cannot be construed as an affidavit, and therefore do not constitute proper evidence under Rule 56 of the Federal Rules of Civil Procedure. Therefore, the Court will disregard said statements.

***3** For these reasons, the Defendants' Motion to Strike Identified Portions of Messer's Affidavit (Doc. # 25) is SUSTAINED.

III. *Defendants' Motion for Summary Judgment (Doc. # 22)*

Defendants Rohrer, City and Police Department have moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Strangely, this Motion does *not* address the liability of four other Springfield police officers named for the first time in the First Amended Complaint,[FN4] nor are these officers mentioned by the Plaintiffs in their Memorandum in Opposition (nor, for that matter, by the Defendants in their Motion for Summary Judgment, their Memorandum in Support, or their Reply Memorandum). Indeed, although this Court granted the Plaintiffs, on May 3, 1996, a thirty-day extension of time for discovery to allow for the scheduling of additional depositions of these Defendants and newly-added Defendant Greg Kisaberth [FN5] (*see* Doc. # 19), the record does not reflect that this discovery was conducted. Certainly, no Answer was filed on behalf of these Defendants (perhaps, because the First Amended Complaint was never served). Accordingly, since it appears that the Plaintiffs' claims against these Defendants have been abandoned, the Court ORDERS the Plaintiffs to show cause, within ten (10) days of the date of this decision, why these five Defendants should not be dismissed from this lawsuit.

> FN4. These additional Defendants are Officer Brian Radanovich, Officer Lorin Wear, Officer Gregory Nourse and Sergeant Teresa Ayers.
>
> FN5. Defendant Kisaberth is a member of the Kettering Police Department, and therefore, presumably, would not have been represented by Counsel for the Springfield Defendants.

After setting forth the proper standard to apply when ruling upon motions for summary judgment, and a statement of facts, the Court will turn to the merits of the Defendants' Motion.

A. *Standard for Summary Judgment Motions*

Before focusing on the merits of the motion, the Court will set forth the relative burdens of the parties once a motion for summary judgment is made. Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Of course, [the moving party] always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Id. at 323. *See also Boretti v. Wiscomb*, 930 F.2d 1150, 1156 (6th Cir.1991) (The moving party has the "burden of showing that the pleadings, depositions, answers to interrogatories, admissions and affidavits in the record, construed favorably to the non-moving party, do not raise a genuine issue of material fact for trial." quoting *Gutierrez v. Lynch*, 826 F.2d 1534, 1536 [6th Cir.1987]). The burden then shifts to the

non-moving party who "must set forth specific facts showing that there is a genuine issue for trial."*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (quoting Fed.R.Civ.P. 56(e)). Thus, "[o]nce the moving party has met its initial burden, the nonmoving party must present evidence that creates a genuine issue of material fact making it necessary to resolve the difference at trial."*Talley v. Bravo Pitino Restaurant, Ltd.*, 61 F.3d 1241, 1245 (6th Cir.1995). Read together, *Liberty Lobby* and *Celotex* stand for the proposition that a party may move for summary judgment by demonstrating that the opposing party will not be able to produce sufficient evidence at trial to withstand a directed verdict motion (now known as a motion for judgment as a matter of law. Fed.R.Civ.P. 50).*Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1478 (6th Cir.1989).

*4 Once the burden of production has so shifted, the party opposing summary judgment cannot rest on its pleadings or merely reassert its previous allegations. It is not sufficient to "simply show that there is some metaphysical doubt as to the material facts."*Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, Rule 56(e)"requires the non-moving party to go beyond the [unverified] pleadings" and present some type of evidentiary material in support of its position. *Celotex Corp.*, 477 U.S. at 324. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."Fed.R.Civ.P. 56(c). Summary judgment shall be denied "[i]f there are ...' genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." ' *Hancock v. Dodson*, 958 F.2d 1367, 1374 (6th Cir.1992). Of course, in determining whether a genuine issue of material fact exists, a court must assume as true the evidence of the nonmoving party and draw all *reasonable* inferences in the favor of that party. *Anderson*, 477 U.S. at 255 (emphasis added). If the parties present conflicting evidence, a court may not decide which evidence to believe, by determining which parties' affiants are more credible; rather, credibility determinations must be left to the fact-finder. 10A Wright, Miller & Kane, Federal Practice and Procedure, § 2726. In ruling on a motion for summary judgment (in other words, in determining whether there is a genuine issue of material fact), "[a] district court is not ... obligated to wade through and search the entire record for some specific facts that might support the nonmoving party's claim."*Interroyal Corp. v. Sponseller*, 889 F.2d 108, 111 (6th Cir.1989), *cert. denied*,494 U.S. 1091 (1990).*See also, L.S. Heath & Son, Inc. v. AT & T Information Systems, Inc.*,1993 U.S.App. Lexis 26670 (7th Cir. October 12, 1993); *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915 n. 7 (5th Cir.), *cert. denied*,113 S.Ct. 98 (1992) ("Rule 56 does not impose upon the district court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment ...."). Thus, a court is entitled to rely, in determining whether a genuine issue of material fact exists on a particular issue, only upon those portions of the verified pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits submitted, specifically called to its attention by the parties.

B. *Statement of Facts*

The following statement of facts is taken from the following properly authenticated exhibits to the parties' memoranda: Affidavit of Mark Rohrer (attached to Doc. # 22); Defendants' Requests for Admissions (attached to Doc. # 22); Affidavit for Search Warrant (attached to Doc. # 22); and non-stricken portions of Affidavit of Karen Messer (attached to Doc. # 23). In addition, the Court will consider the unauthenticated deposition transcript of Plaintiff Karen Messer, *conditioned upon* the filing of the certification page of said deposition, within ten (10) days of the date of this decision, by Defendants' Counsel. Failure to comply with this order may cause this Court to void its decision herein.

*5 On June 14, 1994, Defendant Rohrer, a Detective with the Springfield Police Department, swore to an Affidavit for Search Warrant in regard to the Plaintiffs' residence, located at 2101 Hoppes Avenue in Springfield, Ohio. Defendant Rohrer stated in the Affidavit that he had good cause to believe that the residence contained evidence of "criminal acts, to wit: marijuana, money, bank statements and financial records, drug paraphernalia, financial records of illegal drug trafficking, shipping records, records of airline travel, one-party-consensual telephone conversations, weapons, ordnance, and any other

evidence of criminal activity."(Search Warrant Affidavit). In the Affidavit, Defendant Rohrer set forth the following grounds for his belief:

Affiant, Detective Mark A. Rohrer, is an Officer for the Intelligence Unit of the Springfield Police Department and a member of the Clark-Springfield-Champaign Drug Task Force. Affiant has been with the Intelligence Unit and Task Force for approximately 2 1/2 years and with the Police Department for 8 1/2 years. With the Intelligence Unit and the Task Force[,] Affiant is responsible for investigating illegal drug activity in the Springfield, Clark County, and Champaign County regions. In his capacity as a narcotics detective, Affiant has received extensive training in the detection and investigation of illegal drug activity, including an 80 hour Basic Drug Investigation course given by the U.S. Drug Enforcement Administration, and an interdiction course given by the Blue Ash Police and federal law enforcement agencies.

Within the past two weeks, Affiant and the Intelligence Unit received information that the residents at the above-described location were involved in growing marijuana at that location. An informant told Affiant that approximately eight months ago, he observed numerous plants and a substantial inventory of plant growing equipment at that location. Said informant indicated that at that time, he saw a number of lights suspended from an upstairs bedroom ceiling, hanging directly over the small plants, close to the floor.

Affiant called Agent Jimmie Hawke of the Ohio Bureau of Criminal Identification and Investigation (hereafter BCI) to request assistance in investigating activities at the above-described location. Agent Hawke has also had extensive training in the detection and investigation of illicit drug activity. Agent Hawke used a thermal-imaging device this morning to determine heat loss at the above-described location as compared to the neighboring residences. This imaging, which employs a passive, non-intrusive system which detects differences in the temperature of the object being observed, indicated that at the above described location the southeast upstairs portion of the house appeared hotter than the rest of the residence. Agent Hawke indicated that, based on his training and experience, the electricity usage, unusual heat patterns, are indicative of an indoor marijuana growing operation.

*6 Det. Rohrer checked with the electric company for the electrical usage of the above-described location for the last two years. Reports from the electric company indicate that electrical usage at the above-described location indicates peaks and valleys indicative of grow cycles. The residence at 2101 Hoppes Avenue is heated with gas heat; therefore, there is no logical explanation for these peak periods. Moreover, a comparison of two neighbors' electric usage indicates that the electric usage at 2101 Hoppes Avenue is substantially higher. The residence at 2107 is substantially the same design and size. A copy of these reports are attached hereto.

Det. Rohrer and members of the Springfield Police Department have observed that the lights in the southeast upstairs portion of the house have been on consistently for the last two weeks, during the nighttime hours that the unit is working. The shadowing of the lights observed by Det. Rohrer during the last two weeks is consistent with how the informant described the lights to be hanging eight months ago.

Affiant states that based upon his training and experience, the information supplied to him by the informant, the high electric usage at the subject premises compared to similar neighborhood households, and his observations concerning the subject premises during the last two weeks, probable cause exists to believe that there is ongoing illegal drug cultivation and activity at the subject premises. Affiant states that the above information was relayed directly to him or learned by him from the sources listed above.

Search Warrant Affidavit. In his Affidavit in this case, Defendant Rohrer set forth two additional grounds supporting his belief that there was a "grow operation" being conducted in the Plaintiffs' residence. *First,* he attested that the thermal-imaging device utilized by Agent Hawke had been used in at least three prior grow operation cases in which he had been personally involved, and that in each of those cases, the results had been similar to those discovered by Agent Hawke, and an actual grow operation had been discovered upon execution of search warrants obtained in those cases. *Second,* Defendant Rohrer attested that the confidential informant referred to in

the Search Warrant Affidavit had given reliable information in at least three prior cases involving grow operations in which the Defendant had been personally involved. (Rohrer Affidavit at ¶¶ 4-5).

The search warrant was executed by Defendant Rohrer, Agent Hawke, and other Springfield police officers on June 14, 1994. Although no one was home when they arrived, they were admitted to the residence by Plaintiff Karen Messer, using her key, when she returned to the residence (Rohrer Aff. at ¶ 8; Messer Aff. at ¶ 6). Unidentified officers also entered the residence through an unlocked back door (Rohrer Aff. at ¶ 9; Messer Depo. at 42). No officer exerted any force to gain entry into the house (Defendants' Request for Admissions, # 7).

*7 Plaintiff Karen Messer was directed to a seat in the living room area of the premises, and Defendant Rohrer remained with her in that location for the duration of the search (Rohrer Aff. at ¶ 10; Messer Depo. at 10-11). Although no other resident of the household was present during the execution of the warrant (Rohrer Aff. at ¶ 8), Plaintiff James Messer arrived at the residence before the police had departed (Messer Depo. at 20). The Plaintiffs' minor children, Curtis Lee and Jamie Lynn, were not on the premises at any time during the execution of the warrant (Defendants' Requests for Admissions,1 and 2).

It is not disputed that, at some time during the search, an unidentified officer took photographs of the Plaintiff, which had been taken by her husband and were of a very personal nature, from an envelope in a box in her closet, and spread them out on the bed for others to view, thereby humiliating her (Messer Depo. at 26-27; Messer Aff. at ¶ 8).[FN6] Nor is it disputed that the Plaintiff was held at gunpoint by an unidentified officer (*Id.* at ¶ 6), although she clarified that Defendant Rohrer did not point a weapon at her (Messer Depo. at 11). Finally, it is not disputed that the Plaintiffs' residence was "messed up" by the officers' actions during the search, due to their failure to close dresser drawers and put back boxes which they had removed from closets (*Id.* at 41). There was, however, no physical damage to the residence (*Id.* at 42).

FN6. No comments were made by the officers to Plaintiff Karen Messer regarding these photographs, however (Messer Depo. at 27).

The parties do dispute whether Defendant Rohrer threatened the Plaintiff by telling her that if they found anything, they would take away her children and house. Whereas Plaintiff attested that this Defendant repeatedly made these threats directly to her during the execution of the warrant (Messer Depo. at 10, 25-26, 63), Defendant attested that he made no such threats, although "there was a comment made in the presence of James Messer pertaining to possible actions relative to the custody of the Messers' minor children if a marijuana grow operation would have been discovered."(Rohrer Aff. at ¶ 12).

The parties further dispute the nature of Defendant Rohrer's conduct toward Plaintiff Karen Messer during the search. Although she testified that he screamed at her in a loud voice, and with a very rough tone (Messer Depo. at 62-63), he has attested that he maintained a professional demeanor and never screamed at her (Rohrer Aff. at ¶ 12).

It appears that the only discovery made by the officers as the result of the search was a small quantity of marijuana and drug paraphernalia, found in Plaintiff Randy Messer's room (Messer Depo. at 41). Neither Plaintiff James Messer nor Plaintiff Karen Messer were charged with a crime as a result of this search (Messer Depo. at 46). There is no evidence in the record pertaining to the existence of any criminal proceedings initiated against Plaintiff Randy Messer.

C. *Merits of the Defendants' Motion for Summary Judgment*

*8 This Court's discussion of the Defendants' Motion will be divided into the following sub-parts: *(1)* Plaintiffs' claim that Defendant Rohrer executed the search warrant in an unreasonable manner, thereby violating the Fourth Amendment to the United States Constitution (Counts One and Four); [FN7]*(2)* Plaintiffs' claim that Defendant Rohrer performed an illegal search based upon a search warrant lacking in probable cause, thereby violating the Fourth Amendment to the United States Constitution (Counts Two and Four); [FN8]*(3)* Plaintiffs' claim that Defendant City failed to train its officers in the

proper methods for obtaining search warrants, in violation of 42 U.S.C. § 1983 (Count Three); *(4)* Plaintiffs' procedural due process claim, based upon the Due Process Clause of the Fourteenth Amendment to the United States Constitution (Count Six); *(5)* Plaintiffs' claim for just compensation, based upon the Takings Clause of the Fifth Amendment to the United States Constitution; *(6)* Plaintiffs' state-law claims against Defendant Rohrer (Counts Five, Seven, Eight, Nine, Ten, Eleven and Twelve); and *(7)* Plaintiffs' state-law claims against Defendant City (Counts Five, Seven, Eight, Nine, Ten and Eleven).[FN9]

FN7. The Court will make two points here. *First,* Plaintiffs have not specified any additional constitutional rights which were alleged to be violated by the execution of the search warrant, and the Court will not speculate as to what other rights, if any, the Plaintiffs might have desired to assert in regard to Count One. *Second,* the Court will only consider this claim as it is asserted against Defendant Rohrer, and not as it is asserted against other individual Defendants, who have not moved for summary judgment.

FN8. The Court's reasoning, *supra* note 7, applies equally to Count Two.

FN9. The Court notes here that Defendant Police Department is not a proper party to this action, as it is not *sui juris.* Accordingly, in regard to all claims asserted against the City of Springfield Police Department, the Defendants' Motion for Summary Judgment (Doc. # 22) is SUSTAINED.

1. *Execution of the Search Warrant*

In Counts One and Four of their First Amended Complaint, Plaintiffs allege that Defendant Rohrer violated their rights under the Fourth Amendment to the United States Constitution and 42 U.S.C. § 1983, by executing the search warrant in an unreasonable manner.[FN10]

FN10. The Court notes here that there is neither a claim, nor evidence, that the officers conducting the search exceeded the scope of the Search Warrant.

Defendant Rohrer argues that he is entitled to qualified immunity for his actions in executing the search warrant. In determining whether he is so entitled, the Court must engage in a two-part inquiry: *first,* whether plaintiffs have shown a violation of a constitutionally protected right; and *second,* whether the right is so "clearly established" that a "reasonable official would understand that what he is doing violates that right."*Brennan v. Township of Northville,* 78 F.3d 1152, 1154 (6th Cir.1996) (quoting *Anderson v. Creighton,* 483 U.S. 635, 640 (1987)). The Court need only proceed to the second step of the analysis, if the plaintiffs succeed in showing a violation of a constitutionally protected right. *Id.*

As set forth in the statement of facts, *supra,* it is undisputed that Defendant Rohrer remained with Plaintiff Karen Messer during the execution of the search warrant, and, further, that he did not point a weapon at her, spread out the photographs which her husband had taken of her, participate in "messing up" her residence, or enter the residence in a forcible manner. Indeed the only allegation against Defendant Rohrer in regard to the execution of the search warrant, when construed in the manner most favorably to the Plaintiffs, as the parties against whom this Motion is directed, is that he screamed at the Plaintiff and repeatedly threatened to take her children and house away.

***9** In a case involving more serious misconduct engaged in by officers during the execution of a search warrant, the Sixth Circuit held that "isolated threats and verbal abuse are not violations of constitutional magnitude. Fear from spoken words is not an infringement of a constitutional right."*Ellis v. Ficano,* No. 94-1039, 1995 WL 764127, at *3 (6th Cir.1995) (one officer told another officer, who was pointing a gun at the plaintiff, "Don't pull that trigger"; a second officer told the plaintiff, who began to cry, "Shut up, that's what happens to bad boys"; and a third officer threatened the plaintiff's grandmother by saying, "If you don't tell them where the drugs are, they're going to hurt you real bad") (citing *Emmons v. McLaughlin,* 874 F.2d 351, 353 (6th Cir.1989) (no violation where police officer told plaintiff he would "get him" and that plaintiff's friend was already dead, having committed suicide, thereby

causing plaintiff to be afraid)). Based upon this authority, the Court concludes that Defendant Rohrer's threats and verbal abuse of Plaintiff Karen Messer do not, as a matter of law, violate her rights under the Fourth Amendment to the United States Constitution, nor do they violate 42 U.S.C. § 1983.

Accordingly, in regard to Counts One and Four as they are asserted against Defendant Rohrer in Plaintiffs' First Amended Complaint (Doc. # 18), Defendants' Motion for Summary Judgment (Doc. # 22) is SUSTAINED.[FN11]

> FN11. The Court will make two points here. *First,* since there is no constitutional violation, the Court does not, because it need not, determine whether the Defendant violated a "clearly established right" and is therefore not entitled to qualified immunity. Instead, having concluded that there is no constitutional violation, the Court need not determine whether the Defendant is entitled to qualified immunity.
>
> *Second,* the Court has confined its analysis of these claims solely to the mechanics of the search, itself. Were this Court to conclude *both* that the Search Warrant lacked probable cause, thereby rendering the search invalid, *and* that Defendant Rohrer was not entitled to qualified immunity in regard to that issue, the Court could then conclude that this Defendant should be held liable for his mere act of conducting the search, regardless of its mechanics. However, as is discussed *infra,* the Court does not reach these conclusions.

2. *Validity of Search Warrant*

In Counts Two and Four of their First Amended Complaint, Plaintiffs allege that Defendant Rohrer violated their rights under the Fourth Amendment to the United States Constitution and 42 U.S.C. § 1983, by performing an illegal search based upon a search warrant lacking in probable cause. Again, Defendant Rohrer asserts that he is entitled to qualified immunity in regard to these claims.

In analyzing these claims, the Court will conduct two separate inquiries: *first,* whether the Search Warrant was lacking in probable cause, and if so, whether Defendant Rohrer is liable as a result; and *second,* whether Defendant Rohrer made false and misleading statements in his Affidavit in support of the Search Warrant, and is therefore liable to the Plaintiffs.

First, the Court will first determine whether there was probable cause to issue the Search Warrant. The Supreme Court has stated that in the context of issuing a warrant, probable cause requires a "probability or substantial chance of criminal activity," *Illinois v. Gates,* 462 U.S. 213, 243 n. 13 (1983), which must be determined by examining the "totality of the circumstances." *Id.* at 238.[FN12] Having reviewed the Affidavit for Search Warrant in detail, the Court concludes that even though the information from the confidential informant was eight months old, the Affidavit had *some* indicia of reliability, since Defendant Rohrer and Agent Hawke corroborated the confidential informant's statements by watching the Plaintiffs' residence, measuring the electricity usage, and conducting a thermal imaging test. However, in view of the Affidavit's complete failure to describe the reliability of the confidential informant, this Court concludes that, under the "totality of the circumstances" test, the Search Warrant was not supported by probable cause.

> FN12. As noted by the Defendants, the "totality of the circumstances test" set forth in *Illinois v. Gates,* replaced the "two-pronged test" previously set forth by the Supreme Court in *Aguilar v. Texas,* 378 U.S. 108 (1964), and *Spinelli v. United States,* 393 U.S. 410 (1969).

***10** Having determined that this Search Warrant lacked probable cause, the Court must now determine whether Defendant Rohrer is nevertheless entitled to qualified immunity. Although the right to be free from unreasonable searches is "clearly established," the Court concludes that since the Search Warrant was supported by *some* indicia of probable cause, officers of reasonable competence could disagree as to whether the Warrant was supported by probable cause, and Defendant Rohrer is entitled to qualified immunity. *See Malley v. Briggs,* 475 U.S. 335, 344-45 (1986) ("[o]nly where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable, will the

shield of immunity be lost"). Moreover, given Defendant Rohrer's knowledge about the prior reliability of the confidential informant (information which was not included in the Affidavit for Search Warrant), the Court concludes that his belief that the Warrant was supported by probable cause, though wrong, was objectively reasonable. *See* Jeffers v. Heavrin, 10 F.3d 380, 381 (6th Cir.1993) ("probable cause determinations, even if wrong, are not actionable as long as such determinations pass the test of reasonableness"); *cf.* United States v. Leon, 468 U.S. 897, 924 (1984) (discussing the Fourth Amendment exclusionary rule and stating that the good-faith exception for conducting searches pursuant to invalid warrants turns on "objective reasonableness"). Accordingly, although the Court has concluded that the Search Warrant was not supported by probable cause, it further concludes that Defendant Rohrer is entitled to qualified immunity on this issue.

Second, the Court will determine whether Defendant Rohrer is liable to the Plaintiffs under the theory that he made false and misleading statements in his Affidavit. As explained by the Sixth Circuit, "an action under § 1983 does lie against an officer who obtains an invalid search warrant by making, in his affidavit, material false statements either knowingly or in reckless disregard for the truth."*Hill v. McIntyre,* 884 F.2d 271, 275 (6th Cir.1989) (citing *Franks v. Delaware,* 438 U.S. 154 (1978))."Liability occurs when the officer makes false statements in his affidavit supporting the search warrant, or when he misleads a judge into believing that probable cause exists by deliberately or recklessly failing to present all the relevant facts to the judge."*Adams v. Emmett Twshp. Dept. of Public Safety,* No. 94-1533, 1994 WL 657081, at *1 (6th Cir.1994).

The only evidence submitted by the Plaintiffs, which is in any way connected to the Affidavit for Search Warrant sworn to by Defendant Rohrer, are statements in Plaintiff Karen Messer's Affidavit which assert that "it was very common for her to leave the light on over the vanity mirror in the upstairs bathroom"; that the Plaintiffs' residence had three air-conditioners, four television sets, a swimming pool, and a washer and dryer that operated on an almost continuous basis; and that her neighbor's house was a one-story residence with very limited domestic electrical usage. (Messer Aff. at ¶¶ 3-4).

***11** Having considered this evidence in conjunction with the Affidavit for Search Warrant, and construing all of the evidence in the manner most favorably to the Plaintiffs, this Court concludes that there exists no genuine issue of material fact as to whether Defendant Rohrer *either* made false statements in his Affidavit for Search Warrant, *or* misled the judge into believing that probable cause existed by deliberately or recklessly failing to present all the relevant facts to him. Simply put, there is no evidence that Defendant Rohrer knew that Plaintiffs left a vanity light on in the upstairs bathroom, that their residence was filled with numerous appliances requiring electricity, or that the neighbor's residence had very limited electrical usage. Accordingly, Plaintiffs failed to create a genuine issue of material fact as to whether the Defendant made any false statements in his Affidavit, or failed to present any relevant facts to the judge.

Therefore, in regard to Counts Two and Four as they are asserted against Defendant Rohrer in Plaintiffs' First Amended Complaint (Doc. # 18), Defendants' Motion for Summary Judgment (Doc. # 22) is SUSTAINED.

3. *Liability of Defendant City*

In Count Three of their First Amended Complaint, Plaintiffs allege that Defendant City violated 42 U.S.C. § 1983, by failing to train its officers as to the proper method for obtaining search warrants.

In *Monell v. New York Dep't of Social Services,* 436 U.S. 658 (1978), the Supreme Court held that municipalities cannot be liable under § 1983 on a theory of *respondeat superior,* but rather can be liable thereunder only if they maintain unconstitutional or illegal polices; absent such policies, they may not be sued for the acts of their employees. One approach to establishing municipal liability is to allege a deliberate policy of inadequate training or supervision, which includes situations in which city policymakers are aware that police officers have repeatedly violated constitutional rights, but are "deliberately indifferent" to the need for further training. *City of Canton v. Harris,* 489 U.S. 378, 390 n. 10 (1989).[FN13] Notably, unless a plaintiff shows that the alleged municipal policy is itself

unconstitutional, "considerably more proof than [a] single incident will be necessary" to establish municipal liability. *Oklahoma City v. Tuttle*, 471 U.S. 808, 824 (1985).

> FN13. Under this approach, even though there is no official custom or policy, a plaintiff may establish municipal liability by showing that the municipality has officially condoned the illegal acts, through its deliberate indifference to repeated constitutional violations.

In addition to these requirements, the Sixth Circuit has held that in order to establish municipal liability under § 1983, the plaintiff "must identify the policy, connect the policy to the city itself and show that the particular injury was incurred because of the execution of that policy." *Coogan v. City of Wixom*, 820 F.2d 170, 176 (6th Cir.1987).

In this case, whereas Plaintiffs have failed to adduce *any* evidence pertaining *either* to the City's policy and/or practice of training its officers in the proper method of obtaining search warrants, *or* to any other incidents in which allegedly invalid search warrants were obtained by the City's police officers, Defendant City has provided evidence that it does, indeed, train its officers in regard to search and seizure issues, including the requirements for procuring a search warrant (Ayers Affidavit and attachments thereto). Construing all of the evidence in the record in the manner most favorably to the Plaintiffs, the Court concludes that there exists no genuine issue of material fact as to whether Defendant City violated 42 U.S.C. § 1983, by failing to train its officers as to the proper method of obtaining search warrants.

***12** Accordingly, in regard to Count Three of the Plaintiffs' First Amended Complaint (Doc. # 18), the Defendants' Motion for Summary Judgment (Doc. # 22) is SUSTAINED.

4. *Procedural Due Process Claim*

In Count Six of their First Amended Complaint, Plaintiffs allege that the Defendants entered the Plaintiffs' residence and deprived them of possession of their property without due process of law, in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Unfortunately, Plaintiffs have neither alleged nor explained what property they were deprived of, either with or without due process of law; indeed, they completely failed to address this claim in their Memorandum in Opposition (Doc. # 23).

Without being informed as to what property, if any, the Plaintiffs were deprived of without due process of law, the Court is unable to find that the Plaintiffs have created a genuine issue of material fact as to this claim. Therefore, there being no evidence in the record to create a genuine issue of material fact as to whether Defendant Rohrer or Defendant City is liable for depriving the Plaintiffs of their property without due process of law, in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, the Court must sustain the Defendants' Motion for Summary Judgment in their favor.[FN14]

> FN14. It is axiomatic that Defendant City cannot be held liable under *Monell*, absent a showing of an underlying constitutional violation by one of its employees.

Accordingly, in regard to Count Six (procedural due process) of the Plaintiffs' First Amended Complaint (Doc. # 18), as it is asserted against Defendant Rohrer and Defendant City, the Defendants' Motion for Summary Judgment (Doc. # 22) is SUSTAINED.

5. *Takings Claim*

In Count Six of their First Amended Complaint, Plaintiffs also allege that the Defendants entered the Plaintiffs' residence and deprived them of possession of their property without just compensation, in violation of the Takings Clause of the Fifth Amendment to the United States Constitution. Again, Plaintiffs have neither alleged nor explained exactly what property they were deprived of without "just compensation" and for "public use," in violation of the Takings Clause.

As with the preceding claim, having not been informed as to what property, if any, the Plaintiffs were deprived of without just compensation and for public use, the Court is unable to find that the Plaintiffs have created a genuine issue of material fact as to this claim. Therefore, there being no evidence in the record to create a genuine issue of

material fact as to whether Defendant Rohrer or Defendant City is liable for depriving the Plaintiffs of their property in violation of the Takings Clause of the Fifth Amendment to the United States Constitution, the Court must sustain the Defendants' Motion for Summary Judgment in their favor.[FN15]

FN15.*See supra* note 14.

Therefore, in regard to Count Six (takings claim) of the Plaintiffs' First Amended Complaint (Doc. # 18), as it is asserted against Defendant Rohrer and Defendant City, the Defendants' Motion for Summary Judgment (Doc. # 22) is SUSTAINED.

6. *State-law Claims against Defendant Rohrer*

*13 Plaintiffs have asserted several state law claims against Defendant Rohrer and other individual Defendants. According to the allegations set forth in the First Amended Complaint (Doc. # 18), Counts *Five* (negligent and intentional infliction of emotional distress), *Seven* (invasion of privacy), *Eight* (trespass), *Nine* (assault) and *Eleven* (false imprisonment) are all based upon actions taken during the execution of the search warrant, by Defendant Rohrer and other individual Defendants. Count *Ten* (defamation) is based upon false and defamatory statements "concerning a criminal offense" which were allegedly published by all Defendants. Count *Twelve* (malicious prosecution) alleges that Defendant Rohrer and other individual Defendants initiated criminal proceedings against the Plaintiffs without probable cause, which proceedings were terminated in favor of the Plaintiffs.

a. *Immunity to Counts Five, Seven, Eight, Nine and Eleven*

In regard to those state-law claims, which are predicated upon Defendant Rohrer's conduct during the execution of the search warrant (Counts Five, Seven, Eight, Nine and Eleven), Defendant Rohrer has argued that he is entitled to statutory immunity under the following provisions of the Ohio Revised Code:

§ 2744.03(A). In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to persons or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:

....

(6) ... the employee is immune from liability unless one of the following applies:

(a) His acts or omissions were manifestly outside the scope of his employment or official responsibilities;

(b) His acts or omissions were with malicious purpose, in bad faith, or in a wanton and reckless manner;

(c) Liability is expressly imposed upon the employee by a section of the Revised Code.

Defendant Rohrer argues that none of these exceptions applies, and that he is therefore entitled to statutory immunity (Doc. # 13). As discussed in more detail below, this Court agrees that none of the above exceptions applies.

In regard to the first exception, which would apply if Defendant Rohrer's actions were outside the scope of employment, the Ohio Supreme Court has held that an employee acts within the scope of his employment if he acts in the course of his employment and within his authority. *Stranahan Bros. Catering Co. v. Coit*, 55 Ohio St. 398;45 N.E. 634 (1896). Importantly, an act may be within the scope of employment even if it is willful and malicious. *Osborne v. Lyles*, 63 Ohio St.3d 326, 330;587 N.E.2d 825, 829 (Ohio 1992) (holding that off-duty police officer who allegedly committed various torts after assuming control over the scene of an accident in which he was involved, was acting within the scope of his employment). Only when an employee's act "is so divergent that its very character severs the relationship of employer and employee," will the act fall outside the scope of employment. *Wiebold Studio, Inc. v. Old World Restorations, Inc.*, 19 Ohio App.3d 246, 250;484 N.E.2d 287 (Ohio Ct.App.1985). In this case, construing the evidence in the manner most favorably to the Plaintiffs, none of the facts indicate that Defendant Rohrer acted outside of his scope of employment in regard to any of his actions taken

during the execution of the search warrant, including his threats and verbal abuse directed toward Plaintiff Karen Messer.[FN16] Accordingly, this Court finds that there exists no genuine issue of material fact as to whether the first exception to the Defendant's statutory immunity is applicable.

> FN16. Even if this Court were to assume that these actions were willful and malicious, they would nevertheless have been taken within the Defendant's scope of employment.

***14** The second exception is applicable where a defendant acts "with malicious purpose, in bad faith, or in a wanton or reckless manner."The Ohio Supreme Court has explained that there is a "very high standard" for establishing that an employee has engaged in wanton misconduct within the meaning of § 2744.03(A)(6)(b): "Mere negligence is not converted into wanton misconduct[,] unless the evidence establishes a disposition to perversity on the part of the tortfeasor. Such perversity must be under such conditions that the actor must be conscious that his conduct will in all probability result in injury."*Fabrey v. McDonald Police Dept.*, 70 Ohio St.3d 351, 356;639 N.E.2d 31, 35 (1994) (quotation and citations omitted). Utilizing this standard, and construing the evidence in the manner most favorably to the Plaintiffs, none of the facts in the record indicate that Defendant Rohrer acted with malicious purpose, in bad faith, or in a reckless manner. Accordingly, this Court finds that there exists no genuine issue of material fact as to whether the second exception to Defendant's statutory immunity is applicable.

Finally, Defendant Rohrer would not be entitled to statutory immunity if any provision of the Ohio Revised Code expressly imposed liability upon him. This Court is unaware of any provision in the Ohio Revised Code which would impose such liability upon this Defendant, and Plaintiffs have cited to none. Accordingly, the third exception to Defendant's statutory immunity is also inapplicable, as a matter of law.

Based on the foregoing, this Court holds that Defendant Rohrer is entitled to statutory immunity under O.R.C. § 2744.03(A), in regard to all claims based upon his conduct during the execution of the search warrant (Counts Five, Seven, Eight, Nine and Eleven).[FN17]

> FN17. Since the Court has concluded that Defendant Rohrer has statutory immunity in regard to the Plaintiffs' claim of false imprisonment, it need not determine whether he had a "lawful privilege" to detain Karen Messer during the search. *See Bennett v. Ohio Dept. of Rehab. and Correction*, 60 Ohio St.3d 107, 109;573 N.E.2d 633, 636 (1991) ("False imprisonment occurs when a person confines another intentionally without lawful privilege and against his consent within a limited area for any appreciable time, however short") (quotations and citations omitted).

b. *Defamation (Count Ten)*

In Count Ten of their First Amended Complaint, Plaintiffs allege that all Defendants, including Defendant Rohrer, published false and defamatory statements "concerning a criminal act." Unfortunately, the Plaintiffs neither allege nor explain when these statements were made by the Defendants.

A defamatory statement is "a false publication causing injury to a person's reputation, or exposing him to public hatred, contempt, ridicule, shame or disgrace, or affecting him adversely in his trade or business."*Matalka v. Lagemann*, 21 Ohio App.3d 134;486 N.E .2d 1220 (Ohio Ct.App.1985) (quoting syllabus). If the Plaintiffs allege that Defendant Rohrer made defamatory statements concerning possible criminal activity to his fellow officers and Judge O'Neill *prior* to the search, the Court finds that Defendant Rohrer had a qualified privilege to make such statements, and is not liable for defamation. *See Hahn v. Kotten*, 43 Ohio St.2d 237;331 N.E.2d 713, 718 (1975) (explaining that a qualified privilege situation exists where the publisher of the statement and the recipient "have a common interest, and the communication is of a kind reasonably calculated to protect or further it").

***15** If, on the other hand, the Plaintiffs allege that Defendant Rohrer made defamatory statements *after* the search, the Court finds that there is no evidence in the record to support this allegation. Indeed, there

being no evidence in the record as to the existence of *any* such defamatory statements made in regard to the Plaintiffs---much less, made by Defendant Rohrer---the Court concludes that there exists no genuine issue of material fact as to whether Defendant Rohrer is liable for defamation.

c. *Malicious prosecution (Count Twelve)*

Finally, in Count Twelve of their First Amended Complaint, Plaintiffs allege that all of the individual Defendants, including Defendant Rohrer, committed the tort of malicious prosecution by initiating criminal proceedings against them without probable cause.

Under Ohio law, the four elements required to prove malicious prosecution are: (1) that the defendant maliciously initiated the proceedings against the plaintiff, (2) without probable cause, (3) that the proceedings terminated in plaintiff's favor, and (4) that the plaintiff's person or property were seized during the course of the proceedings. *Ross v. Meyers*, 883 F.2d 486, 487 (6th Cir.1989) (citing *Crawford v. Euclid Nat'l Bank*, 19 Ohio St.3d 135;483 N.E.2d 1168 (1985)). In this case, Plaintiffs have failed to create a genuine issue of material fact as to whether *any* of them were even subjected to criminal prosecution as the result of the search conducted by the Defendants, [FN18] much less, whether said proceedings were without probable cause and were terminated in their favor, or whether Defendant Rohrer had any involvement in the proceedings. Accordingly, the Court concludes that there exists no genuine issue of material fact as to whether Defendant Rohrer is liable for malicious prosecution.

> FN18. Indeed, there is evidence in the record indicating that neither James Messer nor Karen Messer were criminally prosecuted as a result of the search.

For these reasons, in regard to all state-law claims asserted against Defendant Rohrer (Counts Five, Seven, Eight, Nine, Ten, Eleven and Twelve), Defendants' Motion for Summary Judgment (Doc. # 22) is SUSTAINED.

7. *State-law Claims against Defendant City*

Plaintiffs have asserted several state-law claims against Defendant City. As before, according to the allegations set forth in the First Amended Complaint, Counts *Five* (negligent/intentional infliction of emotional distress), *Seven* (invasion of privacy), *Eight* (trespass), *Nine* (assault) and *Eleven* (false imprisonment) are all based upon actions taken during the execution of the search warrant by the individual Defendants. Count *Ten* (defamation) is based upon false and defamatory statements "concerning a criminal offense" which were allegedly published by all Defendants.

a. *Immunity to Counts Five, Seven, Eight, Nine and Eleven*

Section 2744.02(A)(1) of the Ohio Revised Code provides that political subdivisions are generally not liable in damages in a civil action for the acts or omissions of their employees. Under five exceptions set forth in § 2744.02(B), however, political subdivisions may be held liable for the acts of their employees under very limited circumstances, including for "the negligent performance of acts by their employees with respect to *proprietary* functions of the political subdivisions."§ 2744.02(B)(2). The performance of police duties, such as those which occurred during the execution of the search warrant, is, however, a *governmental* function, rather than a proprietary function. O.R.C. § 2744.01(C)(2) (defining governmental function to include the provision of police services); *see also Linley v. DeMoss*, 83 Ohio App.3d 594, 599;615 N.E.2d 631, 634 (Ohio Ct.App.1992) (concluding that the execution of a search warrant falls within the performance of police duties, within the meaning of § 2744.01(C)(2)). Moreover, none of the other exceptions to immunity set forth in § 2744.02(B) are applicable.

***16** Accordingly, this Court holds that Defendant City is entitled to statutory immunity under O.R.C. § 2744.02, in regard to all claims based upon the conduct of the individual Defendants during the execution of the search warrant (Counts Five, Seven, Eight, Nine and Eleven).

b. *Defamation (Count Ten)*

As an initial matter, the Court notes that it is perplexed as to how a political subdivision could

conceivably be held liable for publishing false and defamatory statements. Fortunately, given the absence of any evidence in the record which would create a genuine issue of material fact as to the existence of *any* defamatory statements made by Defendant City, either before or after the execution of the search, the Court need not pursue this issue further. Instead, the Court concludes, as a matter of law, that Defendant City is not liable for defamation.

For these reasons, in regard to all state-law claims asserted against Defendant City (Counts Five, Seven, Eight, Nine, Ten and Eleven), Defendants' Motion for Summary Judgment (Doc. # 22) is SUSTAINED.

WHEREFORE, based upon the aforesaid, Defendants' Motion to Exclude Expert Witnesses from Testifying (Doc. # 21) is SUSTAINED.

Defendants' Motion to Strike Identified Portions of Messers' Affidavit (Doc. # 25) is SUSTAINED.

The Motion of Defendants Mark Rohrer, City of Springfield, and City of Springfield Police Department for Summary Judgment (Doc. # 22) is conditionally SUSTAINED, dependent upon the filing, by Defendant's Counsel, of the documentation specified herein, within ten (10) days of the date of this decision. Judgment will ultimately be entered against the Plaintiffs and in favor of these Defendants, on all claims asserted against them in this lawsuit.

Plaintiffs are ORDERED to show cause, within ten (10) days of the date of this decision, why Defendants Brian Radanovich, Lorin Wear, Gregory Nourse, Teresa Ayers and Greg Kisaberth should not be dismissed from this lawsuit.

S.D.Ohio,1997.
Messer v. Rohrer
Not Reported in F.Supp., 1997 WL 1764771 (S.D.Ohio)

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C In re Subpoena Duces Tecum to AOL, LLC
E.D.Va.,2008.
Only the Westlaw citation is currently available.
United States District Court, E.D. Virginia,
Alexandria Division.
In re SUBPOENA DUCES TECUM TO AOL, LLC.
No. 1:07mc34 (GBL).

April 18, 2008.

Background: Non-party witnesses in an action pending in another district moved to quash a subpoena duces tecum issued to their Internet service provider, seeking production of the witnesses' emails.

Holdings: Affirming an order of Poretz, United States Magistrate Judge, the District Court, Gerald Bruce Lee, J., held that:
(1) Electronic Communications Privacy Act prohibited the provider from producing the emails;
(2) subpoena was overbroad, and thus imposed an undue burden on the witnesses; and
(3) court presiding over the action in the other district was better posed to evaluate the witnesses' privilege claim.

Ordered accordingly.

[1] Witnesses 410 ⚿16

410 Witnesses
410I In General
410k16 k. Subpoena Duces Tecum. Most Cited Cases
Electronic Communications Privacy Act prohibited Internet service provider from producing the emails of non-party witnesses in an action pending in another district, which were sought pursuant to a subpoena duces tecum; issuance of the civil discovery subpoena was not an exception to the provisions of the Act so as to allow the provider to disclose the communications. 18 U.S.C.A. §§ 2701, 2702(a-c), 2703.

[2] Statutes 361 ⚿212.6

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k212 Presumptions to Aid Construction
361k212.6 k. Words Used. Most Cited Cases
In cases involving statutory construction, the court must presume that Congress expressed its intent or legislative purpose through the ordinary meaning of the words used.

[3] Statutes 361 ⚿205

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k205 k. In General. Most Cited Cases
To ascertain legislative intent, the court must look at the statute as a whole, rather than analyzing a single sentence or a single word within a sentence.

[4] Statutes 361 ⚿190

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k190 k. Existence of Ambiguity. Most Cited Cases
When the words of a statute are clear and unambiguous, the court's inquiry ends and the statutory language must be regarded as conclusive.

[5] Witnesses 410 ⚿16

410 Witnesses
410I In General
410k16 k. Subpoena Duces Tecum. Most Cited Cases
Unauthorized private parties and governmental entities are prohibited from using civil discovery subpoenas to circumvent the Electronic Communications Privacy Act's protections. 18 U.S.C.A. §§ 2701, 2702(a-c), 2703; Fed.Rules Civ.Proc.Rule 45, 28 U.S.C.A.

[6] Witnesses 410 ⚿16

410 Witnesses
410I In General
410k16 k. Subpoena Duces Tecum. Most Cited Cases
Subpoena duces tecum seeking emails of non-party witnesses in an action was overbroad, and thus imposed an undue burden on the witnesses, to the extent that it did not limit the documents requested to subject matter relevant to the claims or defenses in the action; the subpoena requested "all" of a witness' emails for a six-week period, which would likely include privileged and personal information unrelated to the action. Fed.Rules Civ.Proc.Rule 45(c)(3)(A)(iv), 28 U.S.C.A.

[7] Witnesses 410 ⚿16

410 Witnesses
410I In General
410k16 k. Subpoena Duces Tecum. Most Cited Cases
When a non-party claims that a subpoena is burdensome and oppressive, the non-party must support its claim by showing how production would be burdensome. Fed.Rules Civ.Proc.Rule 45(c)(3)(A)(iv), 28 U.S.C.A.

[8] Witnesses 410 ⚿16

410 Witnesses
410I In General
410k16 k. Subpoena Duces Tecum. Most Cited Cases
Subpoena imposes an undue burden on a party when a subpoena is overbroad. Fed.Rules Civ.Proc.Rule 45(c)(3)(A)(iv), 28 U.S.C.A.

[9] Federal Courts 170B ⚿1145

170B Federal Courts
170BXIII Concurrent and Conflicting Jurisdiction and Comity as Between Federal Courts
170Bk1145 k. Pendency and Scope of Prior Proceedings; Prisoners Under Arrest. Most Cited Cases
Court presiding over an action in another district was better posed to evaluate a privilege claim asserted by non-party witnesses in that action in support of their motion to quash a subpoena duces tecum seeking to compel an Internet service provider to produce their emails, and thus, the instant court would not rule on the merits of the issue; the subpoena sought information relevant to the claims or defenses available to the parties in the other action. Fed.Rules Civ.Proc.Rule 26(b)(5)(A), 28 U.S.C.A.; Fed.Rules Civ.Proc.Rule 26(b)(1), 28 U.S.C.App.(2000 Ed.)

Ellen D. Marcus, Zuckerman Spader LLP, Washington, DC, for Movant.
Theodore Ira Brenner, Alexander Spotswood de Witt, Brenner Evans & Millman PC, Richmond, VA, for Defense.

MEMORANDUM ORDER

GERALD BRUCE LEE, District Judge.
***1** THIS MATTER is before the Court on State Farm Fire and Casualty Co.'s Objections to Magistrate Judge Poretz's Order, entered on November 30, 2007, quashing State Farm's subpoena to AOL, LLC. This case concerns Cori and Kerri Rigsby's claims that State Farm's subpoena issued to AOL violated the Electronic Communications Privacy Act ("Privacy Act"), codified as 18 U.S.C. §§ 2701-03 (2000), imposed an undue burden on the Rigsbys, and requested e-mails from the Rigsbys that were protected by the attorney-client privilege. The issue before the Court is whether Magistrate Judge Poretz clearly erred by granting the Rigsbys' Motion to Quash, where State Farm's civil discovery subpoena requested: (1) production of the Rigsbys' e-mails from AOL; (2) all of Cori Rigsby's e-mails from a six-week period; and (3) information relevant to *McIntosh v. State Farm Fire & Casualty Co.*, subject to the Rigsbys' attorney-client privilege claims. The Court upholds Magistrate Judge Poretz's decision quashing State Farm's subpoena, and holds that it was not clearly erroneous for the following reasons: (1) the Privacy Act prohibits AOL from producing the Rigsbys' e-mails in response to State Farm's subpoena because a civil discovery subpoena is not a disclosure exception under the Act; (2) State Farm's subpoena imposes an undue burden on the Rigsbys because the subpoena is overbroad and the documents requested are not limited to subject matter relevant to the claims or defenses in *McIntosh*; and (3) the Southern District of Mississippi is better suited to decide whether the information relevant to

McIntosh is privileged because no action is pending in this Court. Thus, Magistrate Judge Poretz's Order is affirmed.

I. BACKGROUND

Cori and Kerri Rigsby are non-party witnesses in *McIntosh v. State Farm Fire & Casualty Co.*, an action pending in the Southern District of Mississippi. No. 1:06cv1080 (S.D. Miss. filed Oct. 23, 2006). The Rigsbys were employed as insurance adjusters by E.A. Renfroe and Co. ("E.A. Renfroe") and discovered what they believed to be fraud with respect to State Farm's treatment of Thomas and Pamela McIntosh's Hurricane Katrina damage claim.[FN1] The Rigsbys provided supporting documents to state and federal law enforcement authorities and filed a *qui tam* action, *United States ex rel. Rigsby v. State Farm Insurance Co.*, in the Southern District of Mississippi, alleging that State Farm defrauded the United States Government by improperly shifting costs from State Farm's wind damage coverage to the federal flood insurance program. No. 1:06cv433 (S.D. Miss. filed Apr. 26, 2006).

In the course of discovery litigation related to *McIntosh*, State Farm issued a subpoena through this Court to AOL, requesting production of documents from the Rigsbys' e-mail accounts pertaining to Thomas or Pamela McIntosh, State Farm Fire & Casualty Co.'s claims handling practices for Hurricane Katrina, Forensic Analysis & Engineering Corporation's documents for Hurricane Katrina, and E.A. Renfroe & Co.'s claims handling practices for Hurricane Katrina over a ten-month period.[FN2] State Farm's subpoena also requested any and all documents, including electronically stored information, related to Cori Rigsby's e-mail account or address from September 1, 2007, to October 12, 2007, a six-week period where Cori Rigsby and her attorneys allegedly concealed from State Farm that her computer had crashed.[FN3] In a letter dated November 1, 2007, the Rigsbys requested that State Farm withdraw the subpoena directed to AOL (Pet'r Mem. in Supp. Ex. C), and State Farm declined. (Pet'r Mem. in Supp. 1.) The Rigsbys then moved to quash State Farm's subpoena, claiming that the subpoena violated the Privacy Act, was overbroad and unduly burdensome, and requested production of e-mails that included privileged communications. (Pet'r Mem. in Supp. 1-2.)

***2** On November 30, 2007, in a hearing conducted by Magistrate Judge Poretz, the court held that: (1) the Rigsbys have standing to object to the disclosure of their personal records; and (2) the information sought by State Farm through its subpoena to AOL was relevant to the claims or defenses asserted in the underlying action and within the permissible scope of discovery, subject to any claim of privilege by the Rigsbys. Magistrate Judge Poretz declined to decide whether any of the information sought was privileged, or whether any exceptions or waiver applied to the privilege claims, finding that the presiding judge in the Southern District of Mississippi was in a better position to make a ruling on the asserted privilege. Magistrate Judge Poretz granted the Rigsbys' Motion to Quash "for the reasons set forth in the ... [Rigsbys'] Memorandum in Support." (Order, Nov. 30, 2007.) State Farm subsequently filed Objections to Magistrate Judge Poretz's Order.[FN4]

II. DISCUSSION

A. Standard of Review

When a magistrate judge issues a written order deciding a pretrial matter that is not dispositive of a party's claim or defense, the parties may file timely objections to the order. FED.R.CIV.P. 72(a). The district judge must consider timely objections and modify or set aside any part of the order that is clearly erroneous or contrary to law. 28 U.S.C. § 636(b)(1)(a) (2000); FED.R.CIV.P. 72(a).

B. Analysis

1. *The Privacy Act*

[1][2][3][4] The Court upholds Magistrate Judge Poretz's Order, quashing State Farm's subpoena, because the plain language of the Privacy Act prohibits AOL from producing the Rigsbys' e-mails, and the issuance of a civil discovery subpoena is not an exception to the provisions of the Privacy Act that would allow an internet service provider to disclose the communications at issue here. In cases involving statutory construction, the court must presume that Congress expressed its intent or legislative purpose through the ordinary meaning of the words used. *Am.*

Tobacco Co. v. Patterson, 456 U.S. 63, 68, 102 S.Ct. 1534, 71 L.Ed.2d 748 (1982). To ascertain legislative intent, the court must look at the statute as a whole, rather than analyzing a single sentence or a single word within a sentence. *Elm Grove Coal Co. v. Dir., Office of Workers' Comp. Programs*, 480 F.3d 278, 293 (4th Cir.2007). When the words of a statute are clear and unambiguous, the court's inquiry ends and the statutory language must be regarded as conclusive. *Am. Tobacco Co.*, 456 U.S. at 68, 102 S.Ct. 1534.

The statutory language of the Privacy Act must be regarded as conclusive because it contains plain and unambiguous language and a coherent and consistent statutory scheme. Section 2701 clearly establishes a punishable offense for intentionally accessing without or exceeding authorization and obtaining electronic communications stored at an electronic communication service facility. 18 U.S.C. § 2701 (2000).Section 2702 plainly prohibits an electronic communication or remote computing service to the public from knowingly divulging to any person or entity the contents of customers' electronic communications or records pertaining to subscribing customers. *Id.*§ 2702(a). Additionally, § 2702 lists unambiguous exceptions that allow an electronic communication or remote computing service to disclose the contents of an electronic communication or subscriber information. *Id.*§ 2702(b-c).Section 2703 provides instances related to ongoing criminal investigations where a governmental entity may require an electronic communication or remote computing service to disclose the contents of customers' electronic communications or subscriber information. *Id.*§ 2703. Protecting privacy interests in personal information stored in computerized systems, while also protecting the Government's legitimate law enforcement needs, the Privacy Act creates a zone of privacy to protect internet subscribers from having their personal information wrongfully used and publicly disclosed by "unauthorized private parties," S.REP. NO. 99-541, at 3 (1986), as *reprinted in* 1986 U.S.C.C.A.N. 3555, 3557.

*3 In *Theofel v. Farey-Jones*, the court reversed the district court's dismissal of the plaintiffs' claim that the defendants intentionally accessed without authorization the plaintiffs' e-mails in violation of the Privacy Act, where the defendants issued a subpoena to the plaintiffs' internet service provider to obtain the plaintiffs' stored e-mails during the course of civil discovery. 359 F.3d 1066, 1071-72, 1077 (9th Cir.2004). After the internet service provider complied with the subpoena, the defendants read the plaintiffs' e-mails, including many that were privileged, personal, and unrelated to the commercial litigation between the parties. *Id.* at 1071.In the course of evaluating the claim, the court emphasized that the Privacy Act protects users whose electronic communications are stored with an internet service provider and reflects Congress's judgment that users have a legitimate interest in the confidentiality of communications stored at such a facility.*Id.* at 1072-73.The court found that the subpoena was invalid because it "transformed ... a bona fide state-sanctioned inspection into private snooping."*Id.* at 1073.Because the invalid "subpoena caused disclosure of documents that otherwise would have remained private," the court held that the invalid subpoena invaded " 'the specific interests that the [Privacy Act] seeks to protect.'"*Id.* at 1073-74 (quoting *J.H. Desnick, M.D., Eye Serv., Ltd. v. ABC*, 44 F.3d 1345, 1352 (7th Cir.1995)).

Similarly, in *Federal Trade Commission v. Netscape Communications Corp.*, the court denied the Federal Trade Commission's ("FTC") motion to compel, where an internet service provider, a non-party in the underlying action, refused to turn over documents containing subscriber identity information to the FTC. 196 F.R.D. 559, 559, 561 (N.D.Cal.2000). The FTC filed a civil lawsuit against the subscribers for violating the FTC unfair competition statute.*Id.* at 559.During pre-trial discovery, the FTC issued a subpoena to the internet service provider pursuant to Federal Rule of Civil Procedure 45.*Id.* at 559.The court distinguished discovery subpoenas from trial subpoenas based on differences in scope and operation and concluded that Congress would have specifically included discovery subpoenas in the Privacy Act if Congress meant to include this as an exception requiring an internet service provider to disclose subscriber information to a governmental entity. *Id.* at 560-61.The court held that the statutory phrase "trial subpoena" does not apply to discovery subpoenas in civil cases and declined to allow the FTC to use Rule 45 to circumvent the protections built into the Privacy Act that protect subscriber privacy from governmental entities. *Id.* at 561.

In *O'Grady v. Superior Court*, the Court of Appeal of

the State of California, Sixth Appellate District, held that enforcement of a civil subpoena issued to an e-mail service provider is inconsistent with the plain terms of the Privacy Act. 139 Cal.App.4th 1423, 44 Cal.Rptr.3d 72, 76-77 (2006). Apple brought a civil action against several unknown defendants for wrongfully publishing on the World Wide Web Apple's secret plans to release a new product. *Id.* at 76.To identify the unknown defendants, Apple issued civil discovery subpoenas to non-party internet service providers, requesting copies of any e-mails that contained certain keywords from the published secret plans. *Id.* at 81.When considering whether the trial court should have quashed the subpoenas, the appellate court analyzed the language of the Privacy Act and found it to be clear and unambiguous. *Id.* at 84, 86-87.The court also found that any disclosure by an internet service provider of stored e-mail violates the Privacy Act unless it falls within an enumerated exception to the general prohibition. *Id.* at 86.Emphasizing the substantial burden and expense that would be imposed on internet service providers if they were required to respond to every civil discovery subpoena issued in a civil lawsuit and how such a policy may discourage users from using new media, the court refused to create an exception for civil discovery and found the subpoenas unenforceable under the Privacy Act. *Id.* at 88-89.

*4[5] Applying the clear and unambiguous language of § 2702 to this case, AOL, a corporation that provides electronic communication services to the public, may not divulge the contents of the Rigsbys' electronic communications to State Farm because the statutory language of the Privacy Act does not include an exception for the disclosure of electronic communications pursuant to civil discovery subpoenas. Like the FTC in Netscape, State Farm insists that a facially valid subpoena *duces tecum* issued under Federal Rule of Civil Procedure 45 fits within the Privacy Act's recognized exceptions under § 2703. However, unlike the FTC in *Netscape*, State Farm argues that all Rule 45 subpoenas fit within the exception for disclosures pursuant to a court order. The Court finds State Farm's argument unpersuasive because § 2703 pertains exclusively to *criminal* investigations, not civil discovery matters such as this. Because State Farm is a private party and this is a civil lawsuit, none of the exceptions for governmental entities under § 2703 apply. Furthermore, agreeing with the reasoning in *Netscape*, the Court holds that "unauthorized private parties" and governmental entities are prohibited from using Rule 45 civil discovery subpoenas to circumvent the Privacy Act's protections.

State Farm has issued a subpoena to the Rigsbys' internet service provider that resembles the subpoena at issue in *Theofel* because it seeks to obtain copies of the Rigsbys' e-mails in the course of discovery for a civil lawsuit. Similar to the plaintiffs in *Theofel*, the Rigsbys seek to protect the privacy of their e-mails, asserting that they are privileged, personal, and unrelated to the civil lawsuit. In line with the court's reasoning in *Theofel*, the Court finds that the Privacy Act protects the Rigsbys' stored e-mails because the Rigsbys have a legitimate interest in the confidentiality of their personal e-mails being stored electronically by AOL. Agreeing with the reasoning in *O'Grady*, this Court holds that State Farm's subpoena may not be enforced consistent with the plain language of the Privacy Act because the exceptions enumerated in § 2702(b) do not include civil discovery subpoenas. Furthermore, § 2702(b) does not make any references to civil litigation or the civil discovery process. For the foregoing reasons, Magistrate Judge Poretz did not clearly err when he found that the Privacy Act prohibits AOL from producing the Rigsbys' e-mails in response to State Farm's subpoena because the Privacy Act's enumerated exceptions do not authorize disclosure pursuant to a civil discovery subpoena.

2. *Undue Burden*

[6][7][8] The Court upholds Magistrate Judge Poretz's Order, quashing State Farm's subpoena, because the subpoena is overbroad to the extent that it does not limit the documents requested to subject matter relevant to the claims or defenses in *McIntosh* and imposes an undue burden on the Rigsbys. "A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena."FED.R.CIV.P. 45(c)(1). A court must quash or modify a subpoena that subjects a person to an undue burden. FED. R. CIV. P. 45(c)(3)(A)(iv). When a non-party claims that a subpoena is burdensome and oppressive, the non-party must support its claim by showing how production would be burdensome.*Vaughan Furniture Co. v. Featureline Mfg., Inc.*, 156 F.R.D. 123, 125 (M.D.N.C.1994). A subpoena imposes an undue

burden on a party when a subpoena is overbroad. *Theofel*, 359 F.3d at 1071-72.

***5** In *Theofel*, the defendant sought access to the plaintiffs' e-mails by issuing a subpoena to the plaintiff's internet service provider in the course of discovery related to commercial litigation between the parties. 359 F.3d at 1071.The defendant's subpoena "ordered production of 'all copies of e-mails sent or received by anyone'... with no limitation as to time or scope."*Id.* After the internet service provider produced 339 messages, many of which were unrelated to the litigation, privileged or personal, the plaintiffs asked the court to quash the subpoena. *Id.* Finding that the subpoena was "massively overbroad," "patently unlawful," and violated the Federal Rules, the magistrate judge quashed the subpoena and awarded sanctions. *Id.* at 1071-72.The plaintiffs subsequently sued the defendant and the defendant's attorney for violating the Privacy Act based on the internet service provider's disclosure of the plaintiffs' e-mails. *Id.* at 1072.On appeal, the court reversed the dismissal of the plaintiffs' Privacy Act claim, emphasizing that the defendant's attorney was supposed to avoid imposing an undue burden on the internet service provider and that the subpoena should have requested only e-mail related to the subject matter of the litigation, messages sent during some relevant time period or messages sent to or from employees in some way connected to the litigation. 359 F.3d at 1071, 1079.The court also emphasized that the subpoena was properly quashed because it imposed an undue burden on the internet service provider by being overbroad and requesting all of the parties e-mails. *Id.*

Similar to the subpoena in *Theofel*, State Farm's subpoena must be quashed because it imposes an undue burden on the Rigsbys by being overbroad and requesting "all" of Cori Rigsby's e-mails for a six-week period. Like the subpoena in *Theofel*, State Farm's subpoena is overbroad because it does not limit the e-mails requested to those containing subject matter relevant to the underlying action or sent to or from employees connected to the litigation, other than Cori Rigsby. Although State Farm limited the e-mails requested to an allegedly relevant six-week period, in contrast to the subpoena in *Theofel* that requested e-mails without any time period limitation, State Farm's subpoena remains overbroad because the e-mails produced over a six-week period would likely include privileged and personal information unrelated to the *McIntosh* litigation, imposing an undue burden on Cori Rigsby. Thus, Magistrate Judge Poretz did not clearly err when he found that State Farm's subpoena was overbroad and imposed an undue burden on Cori Rigsby because State Farm's subpoena did not limit the documents requested to subject matter relevant to *McIntosh*.

3. *Privilege*

[9] The Court upholds Magistrate Judge Poretz's decision to decline making a determination with respect to the assertion of privilege by the Rigsbys because the Court agrees that the presiding judge in the Southern District of Mississippi is in a better position to make a ruling on the asserted privilege. "Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party."FED.R.CIV.P. 26(b)(1). When a party withholds information by claiming that it is privileged or subject to protection as trial preparation material, the party must expressly make the claim and describe the nature of the documents or communications not produced in a manner that does not reveal the privileged or protected information, but enables other parties to assess the applicability of the privilege or protection. FED.R.CIV.P. 26(b)(5)(A). Upon motion by a party or a non-party from whom discovery is sought, the court *in which the action is pending* may make an order protecting a party from "annoyance, embarrassment, oppression, undue burden or expense" by prohibiting or limiting discovery. FED.R.CIV.P. 26(c) (emphasis added). If the motion for a protective order is denied, the court may order a party or non-party to provide or permit discovery. *Id.*

***6** The Rigsbys contend that their personal e-mail accounts likely contain communications with their attorneys related to pending litigation where the Rigsbys are parties or witnesses, including the *McIntosh* litigation in the Southern District of Mississippi. Because State Farm's subpoena requests information relevant to the claims or defenses available to the parties in *McIntosh*, the district court in Mississippi is better posed to evaluate the Rigsbys' privilege claim. Whereas State Farm's subpoena at issue here is the only pending litigation involving the parties in the Eastern District of Virginia. While

acknowledging State Farm's argument that the Rigsbys did not allege sufficient facts or provide a privilege log to support an assertion of privilege, this Court declines to reach the merits of the privilege claim because the Mississippi district court in which the action is pending is better suited to decide whether the information relevant to *McIntosh* is privileged based on their familiarity with the underlying litigation.[FN5] Thus, Magistrate Judge Poretz did not clearly err when he declined to evaluate the Rigsbys' privilege claim on the merits because the Southern District of Mississippi is better posed to determine whether the Rigsbys' information requested by State Farm's subpoena is privileged as it pertains to claims and defenses associated with pending litigation in that jurisdiction.

III. CONCLUSION

The Court affirms Magistrate Judge Poretz's Order and finds that it was not clearly erroneous for three reasons: (1) the plain language of the Privacy Act prohibits AOL from producing the Rigsbys' e-mails in response to State Farm's subpoena because a civil discovery subpoena is not a disclosure exception under the Privacy Act; (2) State Farm's subpoena imposes an undue burden on the Rigsbys because the subpoena is overbroad and does not limit the documents requested to subject matter relevant to the claims or defenses in *McIntosh*; and (3) the Southern District of Mississippi is better posed to decide whether the Rigsbys' information relevant to the claims and defenses in *McIntosh* is privileged because the action is pending in their court, and no action is pending in this Court. For the foregoing reasons, it is hereby

ORDERED that Magistrate Judge Poretz's Order quashing State Farm's subpoena to AOL is AFFIRMED.

The Clerk is directed to forward a copy of this Order to counsel of record.

FN1. E.A. Renfroe is a state Farm contractor.

FN2. State Farm alleges that the Rigsbys admitted to: (1) stealing approximately 15,000 confidential documents from a State Farm laptop computer provided to the Rigsbys when they worked for E.A. Renfroe; (2) forwarding the stolen information via e-mail to the Rigsbys' personal AOL accounts; and (3) providing the stolen information to attorney Dickie Scruggs, who used the stolen information to file hundreds of lawsuits against State Farm, including McIntosh. In *McIntosh*, Magistrate Judge Walker ruled that "State Farm is entitled to Know the basis for the Rigsbys' charges of wrongdoing," and ordered the Rigsbys "to produce the requested documents within their actual or constructive possession" to State Farm. (Order on Mot. to Compel 5, Oct. 1, 2007).

FN3. In this Court, State Farm asserts that the Rigsbys can not comply with the Southern District of Mississippi's court order because the Rigsbys' home computer crashed. However, in *McIntosh*, Magistrate Judge Walker granted State Farm permission to have Cori Rigsby's computer examined by a court-selected expert to retrieve documents from the computer's hard drive. (Order on Mot. to Clarify, Nov. 19, 2007).

FN4. State Farm did not object to Magistrate Judge Poretz's finding regarding the Rigsbys' standing to object to disclosure of their personal records. (Resp't Objections.)

FN5. The district court in Mississippi could require the Rigsbys to create a privilege log and disclose this log to State Farm for further negotiations. *See Med. Components, Inc. v. Classic Med., Inc.*, 210 F.R.D. 175, 179-80 (M.D.N.C.2002) (discussing creation and disclosure of a privilege log to further negotiations between the parties, where the subpoena appeared overbroad on its face and likely asked for privileged materials). In the alternative, the district court in Mississippi could order the Rigsbys to consent to AOL's disclosing the contents of their e-mails under the pain of sanctions. FED.R.CIV.P. 37; *O'Grady*, 44 Cal.Rptr.3d at 88. Furthermore, the district court in Mississippi could conduct an in camera review of the documents that State Farm requested from

AOL. *See* Hohenwater v. Roberts Pharm. Corp., 152 F.R.D. 513, 515 (D.S.C.1994) (conducting an in camera review and finding that both the attorney-client privilege and the work product privilege apply to the documents at issue). But *see* Vaughan, 156 F.R.D. at 125 (declining in camera review of the parties' documents where the parties' failed to provide in their privilege log a *Vaughan* index or specific points regarding why each document was or was not privileged).

E.D.Va.,2008.
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